85-430

Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY AND TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840
(419) 422-2121

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H. Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER AND FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corporation

* Counsel of Record

[Other counsel for petitioners are listed on the inside front cover.]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:
ROBERT H. COMPTON
ASHLAND PETROLEUM COMPANY
P.O. Box 391
Ashland, Kentucky 41114
(606) 329-3735

JAMES W. SHADDIX
PENNZOIL COMPANY
P.O. Box 2967
Houston, Texas 77001
(713) 546-8431

RALPH J. MAYNARD
ALFRED B. SMITH, JR.
TENNECO OIL COMPANY
P.O. Box 2511
Houston, Texas 77002
(713) 757-4249

ERIC SCHWARTZ
TOSCO CORPORATION
2401 Colorado Avenue
Santa Monica, California
90406-2401
(213) 207-7083

THOMAS A. DONOVAN
JUDITH A. MACKAREY
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500
Counsel for
Ashland Oil, Inc.

JOHN P. MATHIS
CATHERINE C. WAKELYN
BAKER & BOTTS
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 457-5500
Counsel for
Pennzoil Company and
Tenneco Oil Company

KENNETH L. BACHMAN, JR.
EUGENE M. GOOTT
CLEARY, GOTTLIEB, STEEN & HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
Counsel for Tosco Corporation

QUESTION PRESENTED

Whether a federal court may discharge its statutory mandate to effect restitution by awarding a money judgment of two billion dollars to state governments who have made no claim or proof of loss:

(a) without first providing notice or opportunity to persons claiming loss to prove their entitlement to a portion of the restitution fund; and

(b) on a finding unsupported by record evidence and contested by persons claiming loss that it would be "futile" to look for persons actually sustaining loss.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. The Basis For Imposing Liability	4
B. The District Court's "Stay" Of Applications To Intervene	5
C. The Basis Of The District Court's Remedy	6
D. Proceedings In The Court Of Appeals	9
REASONS FOR GRANTING THE PETITION	11
I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS DEFINING RESTITUTION AND HOLDING THAT A FEDERAL COURT MAY NOT DISTRIBUTE A COURT CREATED FUND WITHOUT PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD TO POTENTIAL CLAIMANTS	14
A. The Remedy Approved By The Court Of Appeals Does Not Constitute Restitution As Defined By This Court	15
B. The Court Of Appeals Ignored Procedural Safeguards Compelled By This Court's Decisions	19

TABLE OF CONTENTS—Continued

Page

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS THAT A SUMMARY JUDGMENT REMEDY MAY NOT BE SUSTAINED WHEN A DISPUTED ISSUE OF MATERIAL FACT REMAINS, AND IN THE TOTAL ABSENCE OF SUPPORTING RECORD EVIDENCE 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES: Page

Ashland Oil, Inc. v. Department of Energy, 760 F.2d 298 (TECA 1985) 21
Central States Electric Co. v. City of Muscatine, 324 U.S. 138 (1945) 10, 12, 20
Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717, *cert. denied*, 459 U.S. 877 (1982) 16
City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) 18
Donovan v. University of Texas, 643 F.2d 1201 (5th Cir. 1981) 17
Eastern Airlines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (TECA 1979) 24
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1926) 17
Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152 (1825) 15
Federal Power Commission v. Interstate Natural Gas Co., 336 U.S. 577 (1949) 10, 12, 16, 20, 24
Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 U.S. 481 (1968) 18, 24
Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972) 18
Hodgson v. Y. B. Quinada, 498 F.2d 5 (9th Cir. 1974) 17
Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d Cir. 1971) 17
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 24
In re: Department of Energy Stripper Well Exemption Litigation, 578 F. Supp. 586 (D. Kan. 1983) 21
In re: Folding Carton Antitrust Litigation, 744 F.2d 1252 (7th Cir. 1984) 17
Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) 22
Marshall v. Quik-Trip Corp., 672 F.2d 801 (10th Cir. 1982) 17
Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 179 F.2d 896 (8th Cir. 1950) 17
Pasco, Inc. v. Federal Energy Administration, 525 F.2d 1391 (TECA 1975) 6

TABLE OF AUTHORITIES—Continued

	Page
Porter v. Warner Holding Co., 328 U.S. 395 (1946)	10, 12, 14, 15, 16
Tumey v. Ohio, 273 U.S. 510 (1927)	21
Union Oil Company of California v. Department of Energy, 688 F.2d 797 (TECA 1982), *cert. denied*, 459 U.S. 1202 (1983)	6
United States v. Klein, 303 U.S. 276 (1938)	17
United States v. Lieb, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (TECA 1972)	15
United States v. Morgan, 307 U.S. 183 (1939)	10, 12
United States v. Sutton, —— F. Supp. —— (N.D. Ok. September 14, 1984)	14
Van Gemert v. Boeing Co., 739 F.2d 730 (2d Cir. 1984)	17
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Fifth Amendment	2
STATUTES:	
Economic Stabilization Act,	
Pub. L. No. 92-210, 85 Stat. 743 (1971),	
Section 209	2, 3, 12, 15, 16
Section 210	18
Section 211(g)	2
Emergency Petroleum Allocation Act,	
Pub. L. No. 93-159, 87 Stat. 627 (1973),	
Section 5(a)(1)	2, 18
The Warner Amendment,	
Pub. L. No. 97-377, 96 Stat. 1830 (1982),	
Section 155	8, 9, 19
U.S. CODE:	
12 U.S.C. § 1904 note	15
15 U.S.C. § 754	2
28 U.S.C. § 2041-2042	3, 12, 16
42 U.S.C. § 6321	8
42 U.S.C. § 6371	8
42 U.S.C. § 6861 *et seq.*	8
42 U.S.C. § 7001	8
42 U.S.C. § 8621	8

TABLE OF AUTHORITIES—Continued

FEDERAL RULES OF CIVIL PROCEDURE: Page

Fed. R. Civ. P. 19 11
Fed. R. Civ. P. 24 11
Fed. R. Civ. P. 56 ..... 11, 22
Fed. R. Civ. P. 56(c) 4

OPINIONS OF THE COMPTROLLER GENERAL:

B-200170 (October 10, 1980) 18
B-200170 (April 1, 1981) 18
B-209600 (May 19, 1983) 18

CODE OF FEDERAL REGULATIONS:

10 C.F.R. § 211.67 (1975) 6
10 C.F.R. § 212 Subpart V (1981) 21
10 C.F.R. § 212.73 (1975) 4
10 C.F.R. § 212.74 (1975) 4
10 C.F.R. § 212.83 (1975) 6

FEDERAL REGISTER:

41 Fed. Reg. 13898 (April 1, 1976) 23
41 Fed. Reg. 24516 (June 16, 1976) 23
41 Fed. Reg. 24518 (June 16, 1976) 23
41 Fed. Reg. 30096 (July 22, 1976) 23
41 Fed. Reg. 40451 (September 20, 1976) 23
44 Fed. Reg. 7070 (February 5, 1979) 23
44 Fed. Reg. 12634 (March 8, 1979) 23
44 Fed. Reg. 70118 (December 6, 1979) 23
50 Fed. Reg. 27400 (July 2, 1985) 13, 14, 21

LAW REVIEW ARTICLES:

Durand, An Economic Analysis of Fluid Class Recovery Mechanisms, 34 Stan. L. Rev. 173 (November, 1981) 19
Nash, Collecting Overcharges From the Oil Companies: The Department of Energy's Restitutionary Obligation, 32 Stan. L. Rev. 1039 (May 1980) 19

TABLE OF AUTHORITIES—Continued

TREATISES: Page

Restatement of Restitution § 1 *et seq.* (1937) 16

LEGISLATIVE MATERIALS:

128 Cong. Rec. 15116 (December 16, 1982) (daily ed.) 19

128 Cong. Rec. 10435 (December 20, 1982) (daily ed.) 19

S. Rep. No. 507, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283 15

Hearing before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2d Sess., on Settlements By the Department of Energy on Overcharges Within the Petroleum Industry (October 14, 1980) 18

MISCELLANEOUS:

Energy Data Reports: Petroleum Statement, Monthly, Prepared for the Office of Oil and Gas Statistics of DOE (April 1980) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY AND TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Marathon Petroleum Company, Mobil Oil Corporation, Murphy Oil Corporation, Ashland Oil, Inc., Pennzoil Company, Tenneco Oil Company and Tosco Corporation,[1] hereby petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States ("TECA") in this case.

OPINION BELOW

The opinion of the court of appeals is not yet reported. The opinion of the district court appears at 561 F. Supp. 816.[2]

---

[1] The lists of parent, affiliate, and subsidiary companies required by this Court's Rule 28.1 appear in Appendices VIII-XIV.

[2] The opinions of the court of appeals and the district court are contained in the Appendix to the petition for certiorari filed by

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1985. Rehearing was denied on August 15, 1985. Ex. App. 269a. This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970 ("ESA"), *as amended*, Pub. L. No. 92-210, 85 Stat. 743, 12 U.S.C. § 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633, 15 U.S.C. § 754.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Section 209 Pub. L. No. 92-210, 85 Stat. 743 of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. § 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 637, 15 U.S.C. § 754, in pertinent part provides:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the

---

Exxon Corporation that seeks review of the same court of appeals decision of which review is sought here. Exxon Corp. v. United States, No. 85-——. References to those opinions herein are to that Appendix, designated by "Ex. App. ——". References to the Appendix to this Petition are designated by "App. ——."

Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

28 U.S.C. § 2041 provides:

All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.

This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

28 U.S.C. § 2042 provides:

No money deposited [under section 2041 of this title] shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court [under section 2041] has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

Fed. R. Civ. P. 56(c) in pertinent part provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

The unprecedented remedy imposed *sua sponte* by the district court and affirmed by the majority of the court of appeals would award the largest money judgment ever entered against a private firm—nearly $2 billion, including interest—to state governments for expenditure in various energy aid and conservation programs, on the basis of an unsupported finding that the persons actually injured by the overcharges could not be identified.

A. The Basis For Imposing Liability

Granting the government's motion for summary judgment, the district court found, and the court of appeals affirmed, that Exxon had violated the domestic crude oil regulations contained in 10 C.F.R. Sections 212.73, 212.74 (1975) in overpricing crude oil produced and sold from a unitized field known as the Hawkins Field Unit ("HFU") located near Tyler, Texas. The overcharges resulted from placing volumes of crude oil in "upper tier" and "exempt" categories, for which higher prices could be charged, from January 1975 until the end of controls in January 1981. The district court found, and the court of appeals affirmed, that as operator of the HFU Exxon "had caused, and is fully liable for, the violations" and accordingly imposed liability for all overcharges arising from the violations—approximately $2 billion with interest included. Ex. App. 55a.

Petitioners do not challenge the finding of liability. Indeed, petitioners believe that they were damaged by these overcharges and have sought, but have been denied,

the opportunity to prove it. Petitioners limit their petition for certiorari to questions involving the remedy.

B. The District Court's "Stay" Of Applications To Intervene

Although the United States filed suit on June 8, 1978, the remedy issue was not briefed by either party until September 1, 1982 and briefing was not completed until October 6, 1982. In that briefing the United States urged the district court to order payment of the judgment into the U.S. Treasury without first conducting a remedial proceeding to ascertain who had been injured by the HUF overcharges. For this reason, petitioners Pennzoil Company, Tenneco Oil Company, Ashland Oil, Inc., and Tosco Corporation applied conditionally to intervene in the district court on November 24, 1982, seeking to be heard on remedy questions.[3] On December 15, 1982, the district court stayed consideration of these requests, ordering that "there shall be no filing of briefs *amicus curiae* or responses thereto by the potential intervenors or the parties, respectively, concerning remedial issues *until further order of this court.*" App. 4a (emphasis added). Petitioners Marathon, Mobil and Murphy had

---

[3] On December 5, 1980, Exxon had filed a Petition and Counterclaim for Interpleader and Declaratory Relief requesting that Mobil and Tosco, along with other purchasers of Hawkins Field crude oil and certain other working interest and royalty interest owners in the Hawkins Field, be interpled as defendants because of the competing nature of their claims and the claims of DOE to the alleged overcharges. On February 5, 1981, the district court *sua sponte* deferred the presentation and consideration of the interpled parties' claims "until a later time," if and when Exxon's liability for the overcharges was established. App. 3a. The district court ordered the defendants named in Exxon's Interpleader Petition, including Mobil and Tosco, to "answer or otherwise respond within 20 days from the date of service of notice by this Court that such answers or other responses shall be filed." App. 3a. No such notice was ever given and the stay of the interpleader action was never lifted, nor was it even addressed in the final decision of the district court or the majority opinion below.

actively considered intervention, but were dissuaded by the district court's order of December 15. The district court thus led petitioners to believe that it would provide notice and a hearing to potential claimants before the remedy issue would be decided. However, on March 25, 1983, the district court issued its summary judgment on both liability and remedy without ever entering a "further order" giving notice to potential claimants or providing opportunity for claims of injury to be heard. In a brief footnote, the district court denied the motion of petitioners Ashland, Pennzoil, Tenneco and Tosco to intervene. Ex. App. 249a-250a n.56.

C. The Basis Of The District Court's Remedy

The district court held, and all parties agreed, that the burden of the HFU overcharges was initially spread by the purchasers of the HFU crude oil to all refiners by means of the Entitlements Program. 10 C.F.R. § 211.67 (1975).[4] However, the district court went further and assumed, without any record evidence, that refiners still were not injured because the DOE price controls covering sales of refined products by refiners (10 C.F.R. § 212.83) permitted refiners to pass on their increased post-entitlement crude costs attributable to the HFU

---

[4] Ex. App. 247a. Almost all domestic crude oil is ultimately purchased by refiners for refining into petroleum products. The Entitlements Program was intended to equalize the benefits of access to price-controlled domestic crude oil by requiring refiners with greater than average access to such oil to purchase entitlements from refiners with less than average access, thereby roughly equalizing the cost of all crude oil refined in the United States. *See* Union Oil Company of California v. Department of Energy, 688 F.2d 797 (TECA), *cert. denied*, 459 U.S. 1202 (1983); Pasco Inc. v. Federal Energy Administration, 525 F.2d 1391, 1395 (TECA 1975). As the direct result of misclassification of crude oil from the HFU, the amount of price-controlled crude oil reported to the Entitlements Program was decreased, and the pool of price-controlled crude to be spread among all refiners was diminished, raising each refiner's post-entitlement cost of crude oil. Ex. App. 87a.

overcharges in refined product sales. The district court further assumed that because this passthrough could occur, it did occur at all levels of the industry, so that the "ultimate consumer" bore all of the cost of the HFU overcharges. But the district court failed to account for the fact (perhaps through ignorance caused by its failure to accept briefing from interested parties) that most refined products—including diesel fuel, home heating oil, boiler fuel (called "residual fuel oil"), jet fuel and asphalt—were not subject to price controls at virtually all relevant times. (*See* footnote 19, *infra.*) Thus, the court's conclusion that a regulatory control mechanism operated to effectuate cost passthrough in sales of these products was erroneous.

Moreover, whether any HFU overcharges were in fact passed through by refiners to their customers even in sales of controlled products is a disputed issue of material fact. DOE's regulations did not set prices that had to be charged. Rather, they set maximum prices only, based on refiners' costs, including costs of crude oil. Market forces could and generally did cause refined products to sell below the maximum price. Thus it is not clear that the HFU overcharges, which raised refiners' crude oil costs and therefore raised their maximum prices for controlled products, meant that a refiner would charge a higher actual price for a controlled product. These issues were expressly raised in Exxon's opposition to the United States' motion for summary judgment.[5]

The district court then found, without evidence, that overcharges borne by each "ultimate consumer" could not

---

[5] Indeed, the United States carefully refrained from arguing that all HFU overcharges were borne by ultimate consumers, conceding that "all domestic refiners, resellers, retailers and consumers were overcharged as a consequence of Exxon's violations." Brief of Plaintiff United States in Support of Summary Judgment in the district court at 151-152. Thus, the United States conceded that refiners, like petitioners, were one group among several that sustained overcharges.

be ascertained. The judgment directed Exxon to pay the full amount of the HFU overcharges plus interest to the federal Treasury for deposit to an escrow account, to be distributed to the states as additional money available using the Warner Amendment mechanism.[6] This was an idea of the court, not suggested by any party. App. 9a. The Warner Amendment was an otherwise inapplicable statute under which Congress had earlier made a one-time-only appropriation of $200 million (a tenth of the amount at issue here) in funds collected by the DOE in consented settlements of EPAA enforcement proceedings. Congress required the states to expend these funds for five energy assistance programs whose designated beneficiaries consist primarily of hospitals, public schools and low income families.[7]

The district court did not purport to find that the intended beneficiaries of the judgment remedy had in fact sustained any of the HFU overcharges. Rather, the district court invoked "broad equitable power to order restitution" which it asserted was not limited "to a particularly strict interpretation of restitution." Ex. App. 256a. The district court asserted that the remedy would serve the purpose of the price regulations "to relieve consumers of some of the burden of towering oil costs . . . . either by reducing overall consumption through conservation or by direct financial assistance to those most in need." Ex. App. 257a. On this basis alone, the district

---

[6] Section 155 of Pub. L. No. 97-377, 96 Stat. 1830, 1919 (1982).

[7] The designated programs were: Weatherization Assistance Program for Low Income Housing, 42 U.S.C. § 6861, *et seq.*; State Energy Conservation Plans, 42 U.S.C. § 6321; Energy Conservation Program for Schools and Hospitals, 42 U.S.C. § 6371; Energy Extension Service, 42 U.S.C. § 7001; Low Income Home Energy Assistance, 42 U.S.C. § 8621. As Judge Becker noted in dissent in the court of appeals (Ex. App. 157a-166a), the states' distribution of the Warner Amendment funds was criticized by the General Accounting Office for failing to conform to accounting procedures that would insure that the funds were properly spent.

court asserted that its remedy was "the most appropriate remedy in the circumstances of this case." *Id.*

On April 6, 1983, petitioners Ashland, Tosco, Tenneco and Pennzoil, among others, moved for reconsideration of the district court's denial of their motion to intervene. On April 11, 1983, the district court granted in part the motion for reconsideration and permitted those petitioners to intervene as a matter of right solely to appeal the remedy issues. App. 5a.

On April 14, 1983, petitioners Marathon, Mobil and Murphy moved to intervene as a matter of right, urging the district court to reconsider its erroneous factual findings on the impact of the overcharges and the lack of factual and legal basis for the judgment remedy, and alternatively seeking intervention for appeal. On April 29, 1983, the district court granted these petitioners' motion to intervene and retailers' similar motions, but solely to appeal the judgment remedy described in the opinion. App. 6a, 11a. The court did not conduct further proceedings on the disputed factual issues underlying the remedy before entering final judgment on June 7, 1983, adopting without substantive alteration the Warner Amendment remedy described in its opinion.

D. Proceedings In The Court Of Appeals

The court of appeals majority upheld the district court remedy even though it declined to endorse the district court's conclusion that ultimate consumers had, in fact, borne all overcharges. The majority based its affirmance exclusively on the rationale "that any attempt to trace increased costs atributable to the HFU overcharges . . . would be futile." Ex. App. 88a. The majority also held that the district court had been correct in arriving at its decision without granting intervention to persons claiming injury. Without elaboration, the majority then affirmed the remedy as "a reasonable method of com-

pensating the consuming public for the HFU overcharges." Ex. App. 91a.

There was, of course, no evidentiary support for this conclusion either. The court of appeals held that the initial burden of HFU crude oil overcharges had been spread among refiners by the Entitlements Program. However, the majority, while holding that the DOE price control "regulatory system" permitted refiners "to pass through increased costs to their customers" (Ex. App. 87a), also ignored the fact that most refined products were decontrolled. Therefore, most of the "regulatory system" relied on by the majority as effecting passthrough simply did not exist. As to controlled refined products, the majority seemed to admit that refiners might not have been permitted by the marketplace to use control mechanisms to pass the increased costs through to customers, but held that this was impossible to prove. Ex. App. 89a.

In a lengthy dissent, Judge Becker took exception to the affirmance of the district court remedy. Relying principally upon this Court's decisions in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), *United States v. Morgan*, 307 U.S. 183 (1939), *Federal Power Commission v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949) and *Central States Electric Co. v. Muscatine*, 324 U.S. 138 (1945), Judge Becker faulted the district court for failing to discharge its responsibility to dispose of the fund created by its decision in accordance with law. Ex. App. 94a-110a. *"That responsibility plainly cannot be discharged by payment of the fund to those who show no loss . . . ."* *Interstate Natural Gas, supra*, 336 U.S. at 582 (emphasis added in dissent; Ex. App. 101a-102a).

Judge Becker criticized the district court for its failure even to permit good faith claimants to the overcharge fund to intervene in the case prior to the imposition of a remedy. Ex. App. 128a ff. Noting that petitioners and others were granted intervention as a matter of right following entry of judgment (App. 6a), he con-

cluded that even the district court had recognized that petitioners were real parties in interest. He reasoned that the failure of the district court to notify potential claimants and afford them a hearing on their claims deprived them of a due process right (Ex. App. 122a ff.) and contravened the policies underlying Fed. R. Civ. P. Rules 19 and 24 requiring joinder and intervention as of right of parties asserting a claim or interest in funds controlled by the court. *See also* App. 9a.

Judge Becker further criticized the district court conclusion, relied upon by the majority in affirming the remedy, that it was impossible to identify the victims of the overcharges. In Judge Becker's words "[n]o proof exists in the record to support this factual conclusion; nor is any supporting proof cited by the District Court." Ex. App. 143a-144a. At a minimum, Judge Becker reasoned, the district court ignored the requirement of Fed. R. Civ. P. 56 that summary judgment be based on record evidence and the absence of a material disputed issue of fact. Thus, "[t]he District Court did in fact, if not in name, issue an unauthorized summary judgment on restitution issues, made easier by the limitations on the scope of intervention, the time of intervention and the stay of the interpleader issues, all without hearing those claiming to be victims of the violations of law by Exxon." Ex. App. 145a. Accordingly, Judge Becker would have remanded the remedy issue for the development of a record, after notice and hearing, on which a proper award of restitution could be based. Ex. App. 168a.

Petitions for rehearing were timely filed and denied without comment by the court of appeals on August 15, 1985. Ex. App. 269a.

REASONS FOR GRANTING THE PETITION

The judgment in the present case awards $2 billion as "restitution" and sets a precedent for disposition of very large sums in other cases (see footnote 8). In affirming

the award of this vast sum, the Temporary Emergency Court of Appeals departed from its own precedent, ignored controlling decisions of this Court and other courts of appeals concerning substantive and procedural rights of persons claiming injury, and also permitted state governments, who neither claimed nor established injury, to receive the funds. The size of the judgment, the utter disregard of controlling precedent, and the unprecedented nature of the award all merit review by this Court.

In Section 209 of the Economic Stabilization Act Congress mandated that courts apply the familiar concept of restitution that this Court and other courts had previously used in effecting a remedy in similar cases arising from price overcharges. *Porter, supra*; *Morgan, supra*; *Central States, supra*; *Interstate Natural Gas, supra.* Under those decisions, the court must provide notice and an opportunity for parties claiming injury to be heard, the fund must be held in court for a reasonable time to permit claimants to come forward, and the sums must be paid to injured persons or held in the Treasury pursuant to 28 U.S.C. § 2041-2042. Payment to persons not injured by the overcharges does not constitute restitution. *Interstate Natural Gas, supra.*

The court of appeals violated every one of those controlling doctrines in the present case. It affirmed a decision in which the district court had actively excluded and discouraged the intervention of persons claiming injury. Thus losing the benefit of their evidence and views, the court of appeals held without any record that it would be impossible to identify and make restitution to any injured persons. Rather than permit anyone to try, the court of appeals made the wholly legislative determination, again without any record at all, that it was "equitable" for state governments to receive the money so that they could spend more on certain programs for which Congress had once designated other, much lesser, sums to be spent. There was no precedent, finding, or evidence of injury to support this remedy.

Nor did the court of appeals provide any legal rationale for its decision. Despite a lengthy dissent analyzing controlling and contrary decisions from this Court, the Temporary Emergency Court of Appeals and other courts of appeals, to say nothing of the extensive briefing and petitions for rehearing, the majority contented itself with the single *ipse dixit* that the district court "unquestionably" possessed the authority to order this remedy. Ex. App. 92a. Moreover, the majority's attempt to explain why it would be impossible to prove injury is seriously inaccurate and simply ignores the most important assertion made by petitioners.

The result approved by the court of appeals is particularly disturbing because of the unusual roles played by the federal and state governments. They have not pursued their traditional function of assisting injured persons to obtain restitution and of serving as custodian of the funds until either injured persons establish claims or the funds escheat under appropriate procedures. Rather they have become claimants themselves, actively asserting that no actually injured person can prove injury and that the money should go to their respective treasuries, on the questionable assertion that payment to the government is the same thing as payment to the government's injured citizens. There is no support for this result in the statute or its history.

Although the federal government lost this unseemly battle to the states in the district court, and withdrew its notice of appeal on this issue, it has recently announced its "policy", duly published in the Federal Register, that given the result in the present case and one other, the states have now received enough and that the federal Treasury, rather than the states, will from now on receive "restitution" instead of injured persons.[8] As a claimant,

---

[8] Policy Statement signed by the Deputy Secretary of Energy, 50 Fed. Reg. 27400, 27402, col. 3 (July 2, 1985). Mentioned in the

the federal government pursues an interest that is quite different from that of an even-handed administrator trying to establish and administer a workable program, to find those injured by violations of that program, and to compensate them. Rather its interest, and the course it has pursued here, is to complicate and obscure the issues so that it, rather than persons injured, will end up with the money. Whether, absent explicit statutory authority, either federal or state governments may ever assume such an active claimant's role is an unprecedented question of great importance that alone merits certiorari. This case should be reversed to preclude its use as precedent both in other large cases under the EPAA and in other areas where the government conducts economic regulation.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS DEFINING RESTITUTION AND HOLDING THAT A FEDERAL COURT MAY NOT DISTRIBUTE A COURT CREATED FUND WITHOUT PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD TO POTENTIAL CLAIMANTS

In affirming the district court remedy, the majority of the court of appeals ignored both the substantive and procedural requirements for effectuating restitution of a court created fund that were articulated in *Porter*, *supra*, 328 U.S. at 398, 402. When awarding restitution, a federal court "act[s] in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." The court

---

"Policy Statement" as cases affected by it are United States v. Sutton, —— F.Supp. —— (N.D. Ok. September 14, 1984), TECA Nos. 10-57, 10-58 (appeals docketed October 12, 1984) ($210 million not including interest) and in re: Department of Energy Stripper Well Exemption Litigation, D. Kan., MDL No. 378 ($1.2 billion including interest). There are a number of other cases with similar amounts at issue as to which remedy questions have not been litigated.

"may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced." *Id.*[9]

A. The Remedy Approved By The Court Of Appeals Does Not Constitute Restitution As Defined By This Court

The district court remedy purports to implement Section 209 of the ESA, which authorizes the court to "order *restitution* of moneys received in violation of any . . . regulation." 12 U.S.C. § 1904 note (emphasis added). Added as an amendment to the ESA in 1971, the provision confirmed the "inherent equitable power in the court to set things right and order restitution." S. Rep. 92-507, 1971 U.S. Code Cong. & Ad. News 2283, 2291. By restitution, Congress meant the refund of overcharges to the party injured, as indicated by the case cited with approval in the legislative history to the amendment. *Id.* citing *United States v. Lieb*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (TECA 1972) (ESA § 209 authorizes agency to order refund of excess rent to tenant).

The traditional limits of restitution have been fully addressed by this Court in similar contexts. Restitution does not permit a payment of overcharges to parties that have made no proof of injury. In construing a comparable remedial provision in the Emergency Price Control Act of 1942, this Court held that when the agency seeks restitution it "asks the court to act in the public interest by restoring the status quo and ordering

---

[9] *Porter* restates the long established principle that "[c]ourts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled." Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 166 (1825) (Marshall, C.J.)

the return of that which rightfully belongs to the purchaser or tenant." *Porter, supra,* 328 U.S. 395, 402.[10] Under equitable principles, restitution means payment to a person who was injured by the wrongful act. "That responsibility [to make restitution] cannot be discharged by payment of the fund to those who show no loss . . . ." *Interstate Natural Gas, supra,* 336 U.S. at 582.

The remedy upheld by the majority is not restitution within the meaning of ESA Section 209 or this Court's decisions.[11] It does not rest on any evidentiary support for the conclusion that ultimate consumers generally were the victims of the HFU overcharges, and it certainly does not rest on any record evidence that the intended beneficiaries of the district court's remedy sustained any overcharges.

Nor was it necessary for the district court or the court of appeals to have created a remedy. Congress has provided a procedure, in 28 U.S.C. §§ 2041, 2042 for those situations where entitlement to a fund in court is not clear after litigation. Under that procedure, in cases indistinguishable from the present, the amount is paid into court, and any claimant may make application for

---

[10] *See* also Restatement of Restitution, § 1 and accompanying comments, and Introductory Note to Chapter 7 (at 522) where restitution is defined as "restoring to a person property transferred by him to another . . . It implies both a loss by him and a receipt of something by another."

[11] Until this case, TECA appeared to have construed Section 209 to require restitution by means closer to the traditional sense. Citronelle-Mobil Gathering, Inc. v. Edwards, 669 F.2d 1717, 723, *cert. denied,* 459 U.S. 877 (1982). In *Citronelle,* TECA vacated a district court remedy that purported to equate payment of overcharges to the U.S. Treasury with restitution, and recognized "that the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." *Id.* (emphasis in original). Moreover, the court held that pending location of injured persons, the money should be held in court pursuant to 28 U.S.C. §§ 2041, 2042. *Id.* at footnote 6.

it. The money must go to the Treasury after five years, although even then if a valid claim appears it must be paid. *In re: Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1255, 1259-60 (7th Cir. 1984); *Marshall v. Quik-Trip Corp.*, 672 F.2d 801, 807-8 (10th Cir. 1982); *Donovan v. University of Texas*, 643 F.2d 1201, 1208 n.16 (5th Cir. 1981); *Hodgson v. Y.B. Quinada*, 498 F.2d 5, 6 (9th Cir. 1974); *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535-36 (3d Cir. 1971); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 179 F.2d 896, 900-901, 903 (8th Cir. 1950) (en banc). *See Van Gemert v. Boeing Co.*, 739 F.2d 730, 733-736 (2d Cir. 1984). Such funds may go to a state only after escheat proceedings. *United States v. Klein*, 303 U.S. 276, 279-283 (1938); *In re Folding Carton Antitrust Litigation*, *supra*; *Panhandle Eastern*, *supra*.

In this case the court of appeals majority, at the urging of federal and state governments, departed from this line of cases and created different, non-statutory rights for these governments. Instead of being custodians and receiving the money only after it is definitively clear that no claimant for it will succeed, they become claimants themselves, seeking to defeat, rather than to assist, claims of injury by private persons. In the present case, for example, the government argued, and the court of appeals agreed, that a claimant of injury would have to meet a very steep burden of proof. Ex. App. 90a. Conveniently for the government, the difficult burden of proof to establish private injury makes it all the easier for the government to get the money.[12]

---

[12] Here the government benefits from its role as expert agency in its role as claimant. Of course it is not fair to require strict proof from an injured party of precisely what would have happened if the injury had not occurred where the fact of the injury makes that precision impossible. *See, e.g.*, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1926). The court of appeals has done just that, with the dual results of making it easier for the state or federal governments to prevail and of supporting the

A court should base a remedy on adjudicated facts. The terms "equity," "restitution," "reasonable" and "discretion" are not a license to do otherwise. Once a court assumes a roving commission to divorce a remedy from the liability found, no guidelines remain to control the court's largesse with funds rightfully belonging to wronged parties.[13] The General Accounting Office has sharply criticized the agency for arrogating what are essentially legislative powers in fashioning remedies to uninjured parties in administrative actions.[14] The same criticism applies here.[15]

---

court of appeals' finding that it is "futile" to identify injured persons. *Cf.* Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 U.S. 481 (1968).

[13] In fact, the district court remedy is the antithesis of the responsible exercise of equitable power. It disregards principles underlying Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 264 (1972), where the Court reasoned that a state-based *parens patriae* right of action, combined with U.S. government enforcement powers and an individual right of action by every overcharged party would "open the door to duplicative recoveries." No such recovery is to be allowed absent "a clear expression of congressional purpose to make it so." *Id.* Although the states have no *parens patriae* cause of action under the EPAA, the district court has, nonetheless, invested them with a *parens patriae* capacity to oversee the distribution of the largest money judgment ever entered. In doing so, the district court has placed the states in an adversary position to numerous overcharged parties who are also among their citizens. Moreover, because the EPAA also incorporates a private right of action contained in ESA § 210, the award of the judgment to parties without injury opens the door to a second recovery under § 210 by the parties actually sustaining injury.

[14] *See* Hearing before the Committee on Energy and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2d Sess., on Settlements By the Department of Energy on Overcharges Within the Petroleum Industry (October 14, 1980) p. 2. The GAO's analysis is set forth in the three opinions: B-200170 (October 10, 1980); B-200170 (April 1, 1981); B-209600 (May 19, 1983).

[15] *See, e.g.*, City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 71 (D.N.J. 1971). The use of so-called fluid recovery doctrines

And, in fact, the remedy chosen in this case represents a serious incursion on the Constitutional powers of Congress to appropriate funds for its own programs. The district court ignored the intent of Congress that the Warner Amendment be a one-time-only distribution from consent order funds.[16] Its remedy will contribute ten times the amount of funding to the designated energy programs that Congress deemed appropriate in its one-time-only authorization. Whether to extend an act of Congress beyond the limits that Congress itself set is not a determination that should or can properly be made by a court.

B. The Court Of Appeals Ignored Procedural Safeguards Compelled By This Court's Decisions

Apart from this complete departure from statutory and decisional demands concerning the substance of restitution, the court of appeals approved a complete departure from procedural safeguards required by fifth amendment due process as specifically interpreted by this Court. The district court did not even permit real parties in interest to present their claims. Rather, by staying two

---

to justify departure from traditional limits on a court's remedial powers has been advocated and criticized in the academic literature. *Compare* Nash, Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation, 32 Stanford Law Review 1039 (May 1980) *with* Durand, An Economic Analysis of Fluid Class Recovery Mechanisms, 34 Standard Law Review 173 (November 1981).

[16] See remarks of Senator Warner, the amendment's sponsor at 128 Cong. Rec. 15116 (December 16, 1982) (daily ed.) and Representative Dingell, Chairman of the House Subcommittee on Energy and Power, 128 Cong. Rec. 10435 (December 20, 1982) (daily ed.) Representative Dingell emphatically stated:

> The provision is a one-time provision. It should not be viewed as a precedent. It does not confer on DOE any new restitutional or remedial authority or imply that the DOE has such authority. It is a very limited provision aimed at helping people. It is, I stress, an exclusive, one-time disbursement authority.

applications for intervention until the remedy issue had been decided, by failing to notify all potential claimants, and by failing to conduct a hearing on the appropriate distribution of the fund created by the judgment, the district court effectively denied potential claimants to the HFU overcharges any opportunity to be heard on the merits of their claims. The court of appeals approved this holding. That conclusion cannot be reconciled with *Central States, supra*, 324 U.S. at 146, in which this Court held that a fund in court that is subject to restitution to injured persons who are not initially parties must "be held for a reasonable time to permit interested persons to litigate the issue in a tribunal having jurisdiction . . . ."

The court of appeals majority excuses this lapse on the theory that actual overcharges are incapable of judicial proof. Ex. App. 86a-88a. But that "finding" is pure speculation. The court is hardly in a position to know whether proof is possible before giving injured persons an opportunity to submit it. In *Interstate Natural Gas* Justice Frankfurter effectively disposed of an identical claim:

> Various obstacles are conceived to stand in the way of the lower court's fulfillment of this task. But it is, to say the least, premature to conjure up abstract difficulties which, as a practical matter, may evaporate in the light of the informed advice which these various regulatory agencies may be able to furnish readily on the basis of their available records of the financial condition of the utilities subject to them.

336 U.S. at 589-590 (concurring opinion). Of course Justice Frankfurter assumed that regulatory agencies would not themselves be claimants urging that the burden of proof was so great that only the government should be permitted to receive the money. With the DOE firmly told that the federal Treasury is not a proper claimant,

it should be possible for the government to discharge its appropriate duty.[17]

---

[17] The DOE's Office of Hearings and Appeals (which is not autonomous and does not employ administrative law judges) has administered a regulatory procedure for distribution of overcharge funds collected in settlement of agency enforcement proceedings. *See* 10 C.F.R. § 212 Subpart V (1981). *See also*, Ashland Oil Inc. v. Department of Energy, 760 F.2d 298 (TECA 1985) which describes the Subpart V procedure. Implementing these regulations, OHA has in fact identified injured parties and directed some refunds to be made. However, as noted in the dissent (Ex. App. 156a ff.), the General Accounting Office has criticized DOE for not utilizing these procedures to distribute all overcharge funds. The difficulty, we submit, is that as long as the federal government expects to end up with the funds itself, it will never vigorously pursue identification and compensation of injured parties.

In one very large case, the district court for the District of Kansas referred for fact finding the task of ascertaining the parties injured as the result of an injunction issued in *In re*: Department of Energy Stripper Well Litigation, 578 F. Supp. 586 (D. Kan. 1983). In the referral proceeding, which involves over $1.2 billion including interest, OHA has determined that the overcharges to certain levels of distribution can be proven in approximate amounts. Ex. App. 139a. DOE says the failure to make a more precise determination proves its point that injury cannot be specified precisely. DOE "Policy Statement," 50 Fed. Reg. 27400 (July 2, 1985). But it was—conveniently—in the federal government's financial interest for DOE to find it impossible for others to prove injury, and thus that finding is questionable. *See* Tumey v. Ohio, 273 U.S. 510, 532 (1927). Nonetheless, the determination reached by OHA in Subpart V proceedings and the findings made on referral in the *Stripper Well* case squarely refute the district court finding, affirmed by the majority, that overcharges are utterly incapable of proof.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS THAT A SUMMARY JUDGMENT REMEDY MAY NOT BE SUSTAINED WHEN A DISPUTED ISSUE OF MATERIAL FACT REMAINS, AND IN THE TOTAL ABSENCE OF SUPPORTING RECORD EVIDENCE

As the dissent noted, the cases supporting the conclusion that the district court was without power to render summary judgment on the remedy issue "on its own initiative, without hearing" and on the basis of the disputed factual conclusion that those who sustained HFU overcharges cannot be identified "are too numerous to list and discuss . . . ." Ex. App. 144a. Summary judgment on such a record contravenes Fed. R. Civ. P. 56. *Kennedy v. Silas Mason Company*, 334 U.S. 249, 256-257 (1948). "[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." [18]

Had they not been precluded from establishing their claims by the district court's stay and order, petitioners would have established that: (1) ultimate consumers could not have borne any HFU overcharges reflected in sales of decontrolled petroleum products; and (2) sufficient economic data exist to demonstrate that refiners as a class absorbed at least an identifiable percentage of the overcharges associated with controlled products.

---

[18] The Advisory Committee Note to the 1963 Amendment to Fed. R. Civ. P. 56 expressly states that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Decontrolled products. The crude oil cost regulations could not have served to transfer the impact of *all* HFU overcharges to ultimate consumers because approximately half the sales volume of petroleum products refined from crude oil were exempt from those regulations during most of the time at issue.[19] Because the regulations required crude oil costs to be allocated between exempt and controlled products, even in theory a refiner could only utilize the regulations (assuming favorable market conditions) to pass on a proportionate amount of its share of HFU crude oil overcharges in sales of the controlled products. Neither the district court nor the court of appeals has addressed this argument which, by itself, completely undercuts the factual predicate of a remedy designed solely to benefit so called ultimate consumers.[20]

---

[19] Residual fuel oil was decontrolled by the DOE's predecessor, the Federal Energy Administration (FEA), effective June 1, 1976. 41 Fed. Reg. 13896 (April 1, 1976). Middle distillates (No. 2 heating oil, No. 2 diesel fuel, No. 1 heating oil, No. 1 diesel fuel, and kerosene) were decontrolled by FEA effective July 1, 1976. 41 Fed. Reg. 24516 and 24518 (June 16, 1976). Naphthas, gas oils and "other products" were exempted effective September 1, 1976, 41 Fed. Reg. 30096 (July 22, 1976). Naphtha jet fuel was exempted effective October 1, 1976. 41 Fed. Reg. 40451 (September 20, 1976). Kerosene-base jet fuel and aviation gasoline were decontrolled by DOE effective February 26, 1979. 44 Fed. Reg. 7070 (Feb. 5, 1979); 44 Fed. Reg. 12634 (March 8, 1979). Butane and natural gasoline were decontrolled effective January 1, 1980. 44 Fed. Reg. 70118 (December 6, 1979).

[20] The percentage of HFU overcharges that could not be passed on by means of the regulatory mechanism was roughly equal to the percentage of total petroleum products exempted from price controls. For example, from July 1, 1976 until January 27, 1981, residual fuel oil and middle distillates (i.e., diesel fuel and home heating oil) accounted for about 30% by volume of all domestic refinery production. *Energy Data Reports: Petroleum Statement, Monthly,* Prepared for the Office of Oil and Gas Statistics of DOE. From July 1, 1976, a date when both of these categories of products were exempt, until January 27, 1981, Exxon incurred $688,520,768.03 in overcharges. *See* 561 F. Supp. at 860, Appendix I. At least

Controlled products. In declining to afford petitioners an opportunity to prove the amount of HFU overcharges absorbed rather than passed through in sales of controlled products, the district court concluded, and the court of appeals affirmed, that the task of proving the incidence of injury was impossibly complex.[21] However, as the dissent noted, the district court reached this conclusion without an evidentiary record and in the face of judicially noticeable proceedings in which the incidence of overcharges had in fact been determined with adequate precision. Ex. App. 126a. As this Court has held in analogous regulatory contexts, the calculation of overcharges is "an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process." *Interstate Natural Gas, supra,* 336 U.S. at 584.

---

30 percent of these overcharges to refiners could not have been passed on to purchasers in the regulated sales of price-controlled refined products, because they were attributable to the exempt products of residual fuel oil and middle distillates. In other words, about $209,824,645.00 of these overcharges and $222,031,042.00 of the interest are attributable to sales of these two exempt products alone. No factual or legal basis exists for claiming that DOE price regulations resulted in the passthrough of these costs by refiners to consumers.

[21] Had the district court or the appellate court majority applied the principles of this Court's decisions in Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 U.S. 481 (1968) and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) as TECA had in Eastern Airlines Inc. v. Atlantic Richfield Co., 609 F.2d 497 (TECA 1979), the impossibility of proving the absorption or pass on of overcharges in transactions subsequent to the first purchases would have required the entire restitutionary award to be made to the first purchaser unless a showing was made that a subsequent purchaser had a fixed quantity cost plus contract or its functional equivalent.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:
JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840
(419) 422-2121

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H. Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

ROBERT H. COMPTON
ASHLAND PETROLEUM COMPANY
P.O. Box 391
Ashland, Kentucky 41114
(606) 329-3735

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER AND FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corporation

THOMAS A. DONOVAN
JUDITH A. MACKAREY
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500
Counsel for
Ashland Oil, Inc.

* Counsel of Record

Of Counsel:

JAMES W. SHADDIX
PENNZOIL COMPANY
P.O. Box 2967
Houston, Texas 77001
(713) 546-8431

RALPH J. MAYNARD
ALFRED B. SMITH, JR.
TENNECO OIL COMPANY
P.O. Box 2511
Houston, Texas 77002
(713) 757-4249

ERIC SCHWARTZ
TOSCO CORPORATION
2401 Colorado Avenue
Santa Monica, California
90406-2401
(213) 207-7083

JOHN P. MATHIS
CATHERINE C. WAKELYN
BAKER & BOTTS
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 457-5500

Counsel for
Pennzoil Company and
Tenneco Oil Company

KENNETH L. BACHMAN, JR.
EUGENE M. GOOTT
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

Counsel for Tosco Corporation

APPENDICES

APPENDIX I

List and Status of Parties in the Appellate Court as required by Rule 34.1(b)

UNITED STATES OF AMERICA, Plaintiff-Appellee,

STATES OF ALABAMA, ARKANSAS, CALIFORNIA, et al., Intervenor-Appellees,

EXXON CORPORATION, Defendant-Appellant; (No. DC-93)

NATIONAL OIL JOBBERS COUNCIL and the JOBBERS' GROUP, Intervenor-Appellants; (No. DC-91)

GLADIEUX REFINERY, INC., Intervenor-Appellants, (No. DC-92)

INDICATED REFINERS, Champlin Petroleum Company, Ashland Oil, Inc., Tenneco Oil Company, American Independent Refiners Association, Pennzoil Company, and Texas City Refining, Inc., Intervenor-Appellants, (No. DC-94)

GASOLINE RETAILERS, Luther Griffin, t/a Palmer Highway Exxon, Edward McGovern, t/a Maple Avenue Exxon, Anthony Monaco, t/a Milltown Exxon Servicecenter, Inc., Donald E. Skilling, t/a Edon Service Corp., Tex Shipley, t/a Shipley's Standard Service, Intervenor-Appellants; (No. DC-95)

TOSCO CORPORATION, Intervenor-Appellant; (No. DC-96)

PHILADELPHIA ELECTRIC COMPANY, Intervenor-Appellant; (No. DC-97)

AIR TRANSPORT ASSOCIATION OF AMERICA, Intervenor-Appellant; (No. DC-98)

GERALDINE H. SWEENEY, RJG CAB, INC., NATIONAL FREIGHT, INC., Intervenor-Appellants; (No. DC-99)

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, and MURPHY OIL CORPORATION, Intervenor-Apellants; (No. DC-100)

APPENDIX II

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

Filed Feb. 5, 1981

ORDER

This matter is before the court *sua sponte*. It appears that the prosecution of defendant Exxon Corporation's Petition and Counterclaim for Interpleader and Declaratory Relief, which interpleads over 2000 parties, may result in substantial administrative burdens being imposed on the parties and the court. It further appears that the government's theory of operator liability, which underlies Exxon's Petition and Counterclaim, may be found to be inappropriate in a case currently pending before the Temporary Emergency Court of Appeals, *Sauder v. DOE*, appeal docketed, No. 10-25 (May 22, 1980). It further appears that, regardless of the decision in *Sauder v. DOE*, Exxon's motion to dismiss may then be ripe for disposition by this court. Thus, it is not yet clear that Exxon's interpleader action need now proceed, inasmuch as it is possible (although the court expresses

no opinion as to the relative likelihood) both that the impetus behind Exxon's petition and counterclaim may be removed, and that this case may be dismissed. Therefore, rather than addressing at this time the administrative problems resulting from Exxon's petition and counterclaim, the court finds it advisable to extend the time within which the interpled parties must respond to Exxon's petition and counterclaim. In this way, the court will defer consideration and resolution of the administrative problems until a later time. Therefore, in accordance with the foregoing, it is, by the court, this 5th day of February, 1981,

ORDERED that all defendants in Exxon Corporation's Petition and Counterclaim for Interpleader and Declaratory Relief shall answer or otherwise respond within 20 days from the date of service of notice by this court that such answers or other responses shall be filed.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed Dec. 15, 1982]

ORDER

Upon consideration of Defendant's Motion to Stay Consideration of the "Conditional Motion of Indicated Refiners to Intervene," the submissions of the plaintiff and the potential intervenors in connection therewith, and the entire record in this case, it is, by the Court, this 5th day of December, 1982.

ORDERED that Defendant's Motion to Stay Consideration of the "Conditional Motion of Indicated Refiners to Intervene" is granted; and it is further

ORDERED that the Indicated Refiners' Conditional Motion to Intervene is stayed until further order of this Court, and no responses to that Motion shall be made by the parties until 20 days after service of notice by this Court that such responses shall be filed; and it is further

ORDERED that there shall be no filing of briefs *amicus curiae* or responses thereto by the potential intervenors or the parties, respectively, concerning remedial issues until further order of this Court.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX IV

BEFORE THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed Apr. 11, 1983]

ORDER

This 11th day of April, 1983, it is hereby ORDERED that the Motion of Indicated Refiners for Reconsideration of Denial of Intervention filed on April 6, 1983 is granted, that the Conditional Motion of the Indicated Refiners filed on November 24, 1982 is granted, and that Champlin Petroleum Company, Tenneco Oil Company, Pennzoil Company, Tosco Corporation, Ashland Oil, Inc., Texas City Refining, Inc., and the American Petroleum Refiners Association may intervene in this action solely for purposes of appeal on the remedy issue.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States District Judge

APPENDIX V

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed Apr. 29, 1983]

MEMORANDUM

On March 25, 1983 this court issued a Memorandum Opinion ("Mem.") disposing of the parties' cross-motions for summary judgment and directing plaintiff Department of Energy ("DOE") to submit a proposed judgment for the court's consideration within fifteen days, with defendant Exxon Corporation ("Exxon") to submit its comments thereon no later than ten days thereafter. DOE submitted its proposed judgment on April 11, 1983. Exxon filed its reply on April 21, 1983.

After the issuance of the Memorandum Opinion several motions to intervene were filed. The motions can be divided into two groups, those by oil refiners, wholesalers and retailers, on the one hand, and those by several States on the other.[1] Both groups focus their attention on

---

[1] Each of the motions to intervene is listed in the Order which accompanies this Memorandum. In addition, a group of refiners consisting of Champlin Petroleum Company, Tenneco Oil Company,

the remedy fashioned by the court which directs payment by Exxon of the overcharges into an escrow account at the United States Treasury, to be disbursed to the States in accordance with the procedures of Section 155 of Pub. L. No. 97-377. Mem. at 83-85. The industry applicants contest that remedy, arguing that they were the victims of the overcharges to whom restitution is due. They now seek to intervene solely for the purpose of establishing their right to appeal the remedy question to the Temporary Emergency Court of Appeals ("TECA"). The States, too, seek to intervene solely on the remedy issue, but wish to have the opportunity to comment on the proposed judgment as well.

Both the industry applicants and the States contend that they may intervene as a matter of right under Fed.

Pennzoil Company, Tosco Corporation, Ashland Oil, Inc., Texas City Refining, Inc., and the American Petroleum Refiners Association (the "Indicated Refiners"), filed a motion for reconsideration of the denial of their earlier motion to intervene. The motion for reconsideration was granted on April 11, 1983.

The "Retailers" appearing in the Order accompanying this Memorandum filed a petition for limited intervention on January 20, 1983, which was denied in the Memorandum Opinion. Mem. at 77 n.56. Unlike the Indicated Refiners, the Retailers have filed no motion for reconsideration. The court, however, will *sua sponte* reconsider its denial of the Retailers' petition for intervention in light of the standards discussed at pp. 3-5, *infra*. The court will, however, afford DOE and Exxon an opportunity to respond to the petition for intervention, to address in particular the question of whether the Retailers ought to be allowed to intervene not only on behalf of themselves but also as representatives of a class of similarly situated retailers.

Finally, the States of Arkansas, Delaware, Iowa, Kansas, Louisiana, North Dakota, Rhode Island and Texas have moved to intervene and have also moved that the court certify a class consisting of all States not otherwise represented by counsel before this court. The court finds, however, that the proposed class is not so numerous as to make joinder impracticable, in view of the narrowness of the issue on which the States are being allowed to intervene, and so will deny the motion for class certification.

Rule Civ. Pro. 24(a)(2), claiming an interest in the subject matter of this action, namely, in the distribution of the fund created by restitution of the overcharges by Exxon. In the alternative, the applicants seek permissive intervention under Fed. Rule Civ. Pro. 24(b)(2).

Both DOE and Exxon have opposed the various motions of the States to intervene. DOE argues that the motions are untimely and will result in undue delay and confusion. Exxon argues that the States have no legally protected "interest" in this action and that, in any event, the States' interest, if any, is adequately represented by DOE. In addition, DOE and Exxon have opposed the motion of one of the industry applicants, arguing that it is untimely and that the interests of this applicant are adequately represented by the one group of Indicated Refiners whose motion to intervene has been granted.

The court finds that the applicants for intervention are entitled to intervene as a matter of right under Fed. Rule Civ. Pro. 24(a)(2).

Rule 24(a)(2) sets forth four prerequisites to intervention of right: (1) an interest in the subject matter of the action; (2) possible impairment as a practical matter of the ability to defend that interest if intervention is denied; (3) inadequate representation of that interest by existing parties; (4) a timely application for intervention.

The 'interest" to be protected is not so narrowly defined as Exxon would have it. The present language of Rule 24 was designed to liberalize the right to intervene in federal actions, *United States v. AT&T*, 642 F.2d 1285, 1291 (D.C. Cir. 1980), and is to be "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969), quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

In this case, the industry applicants—refiners, wholesalers, and retailers—all allege that they, not the ultimate consumers of petroleum products, bore the burden of Exxon's overcharges and are entitled to restitution. For purposes of deciding whether to allow intervention the court must accept a party's well-pleaded allegations as true, and cannot look behind those allegations to reach the merits of the applicant's claims as a basis for denying intervention. *United States v. AT&T*, *supra*, 642 F.2d at 1291. The industry applicants have properly pleaded an interest in the overcharges by Exxon, and so have satisfied the "interest" test. The States, for their part, obviously have a strong interest in defending before this court and on appeal this court's decision that they, on behalf of their citizens, are to receive restitution of the overcharges.

Furthermore, the States have adequately demonstrated that representation of their interest by DOE may be inadequate. The applicant need only show that representation of his interest "may be" inadequate, and the burden of making that showing is "minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). DOE never pursued or even suggested the remedy fashioned by this court. The States' defense of their interest may therefore be more vigorous than would that of DOE.

Finally, timeliness is a requirement committed to the discretion of the district court in light of all the circumstances. *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980), and may be proper even after a judgment has been entered. *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975). In this case the court, at the request of DOE and Exxon, had stayed earlier motions to intervene by industry applicants pending resolution of the issue of Exxon's liability for the overcharges. The interest which the States seek to defend is in the overcharge escrow fund to be created pursuant to the Memorandum Opinion.

Accordingly, the applications for intervention, all filed within a few weeks of that Memorandum Opinion, cannot be denied as untimely.

In order to avoid undue delay, however, the scope of the applicants' intervention shall be limited to the question of the proper remedy in this case. The district court has the power to limit intervention. *Smuck v. Hobson*, *supra*, at 179-80; *cf. United States v. AT&T*, *supra*, at 1291 (the limited nature of the intervenor's interest determines the scope of intervention). Moreover, in this case none of the applicants has requested the right to intervene with respect to the underlying substantive issues of Exxon's liability for the overcharges. Instead, each seeks to advance its claim to restitution of those overcharges. Accordingly, intervention by the industry applicants shall be solely for the purpose of arguing the remedy issue on appeal before the TECA. The States may intervene for the same purpose but they will be permitted, in addition, to submit comments on DOE's proposed judgment and Exxon's reply thereto. The States' comments shall be limited, however, to ensuring disbursement of the funds in accordance with the procedures described in the Memorandum Opinion, and shall not address the several substantive arguments on the merits by which Exxon contends that the amount of its liability ought to be reduced.

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed Apr. 20, 1983]

ORDER

In accordance with the foregoing Memorandum, it is, by the court, this 29th day of April, 1983,

ORDERED that the following applications for intervention in this case shall be, and hereby are, granted:

A. *Industry Intervenors*

(1) Marathon Petroleum Company, Mobil Oil Corporation, and Murphy Oil Corporation;

(2) The National Oil Jobbers Council and the "Jobbers' Group";

B. *States*

(1) Alabama, California, Illinois, Michigan, Mississippi and Ohio;

(2) Arkansas, Delaware, Iowa, Kansas, Louisiana, North Dakota, Rhode Island and Texas;

(3) New York;

(4) Commonwealth of Pennsylvania;
and it is further

ORDERED that the motion by Arkansas, Delaware, Iowa, Kansas, Louisiana, North Dakota, Rhode Island and Texas for certification of a class consisting of all States not otherwise represented by counsel before this court is denied; and it is further

ORDERED that the Industry Intervenors may intervene solely for the purpose of appeal on the issue of the proper remedy in this case; and it is further

ORDERED that the States may intervene only for the purpose of appeal on the issue of the proper remedy in this case and for the purpose of submitting comments to this court on the parties' proposed judgment, which comments shall be limited to ensuring disbursement of funds from the escrow account described in this court's Memorandum Opinion of March 25, 1983 in accordance with the procedures described therein; and it is further

ORDERED that the States shall submit their comments on the proposed judgment no later than May 9, 1983; and it is further

ORDERED that plaintiff and defendant shall not later than May 9, 1983 respond to the petition for limited intervention filed January 20, 1983 by Luther Griffin t/a Palmer Highway Exxon, *et al.* (the "Retailers").

/s/ Thomas A. Flannery
United States District Judge

APPENDIX VI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed May 5, 1983]

ORDER

Upon consideration of the Motion By The States of Arkansas, Delaware, Iowa, Kansas, Louisiana, North Dakota, Rhode Island and Texas ("the States") to Add the State of West Virginia as an Intervenor-Plaintiff, the Memorandum of Points and Authorities In Support thereof, and all opposition thereto, it is this 5th day of May 1983 hereby

ORDERED that the Motion of the States to add the State of West Virginia as an Intervenor-Plaintiff shall be, and hereby is, granted; and it is further

ORDERED that the State of West Virginia may intervene only for the purpose of appeal on the issue of the proper remedy in this case and for the purpose of submitting comments to this Court on the parties' proposed judgment, which comments shall be limited to en-

suring the disbursement of funds from the escrow account described in this Court's Memorandum Opinion of March 25, 1983 in accordance with the procedures described therein; and it is further

ORDERED that the State of West Virginia shall submit its comments on the proposed judgment no later than May 9, 1983.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX VII

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed May 5, 1983]

ORDER

This matter is before the court on three motions to intervene. Upon consideration of the motions, and in accordance with the reasons expressed in this court's Memorandum of April 29, 1983, it is, by the court, this 5th day of May, 1983,

ORDERED that the motion to intervene of Consumers Power Company, Hudson Refining Company, Inc., U.S. Oil and Refining Company, and Gladieux Refinery, Inc., is granted; *provided*, that said intervention shall be solely for the purpose of appeal on the issue of the proper remedy in this case; and it is further

ORDERED that the motions to intervene of the State of Minnesota and the State of New Jersey are granted; *provided* that said intervention shall be only for the purpose of appeal on the issue of remedy in this case and

for the purpose of submitting comments to this court on the parties' proposed judgment, which comments shall be limited to ensuring disbursement of funds from the escrow account described in this court's Memorandum Opinion of March 25, 1983 in accordance with the procedures described therein; and it is further

ORDERED that the States of Minnesota and New Jersey shall submit their comments on the proposed Judgment no later than May 9, 1983.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX VIII

Marathon Petroleum Company is a wholly owned subsidiary of Marathon Oil Company, which is in turn a wholly owned subsidiary of United States Steel Corporation.

The subsidiaries and affiliates (not wholly owned) of Marathon Petroleum Company are:

Adela Investment Company, S.A.
Altos Hornos de Vizcaya, S.A. (AHV)
Arctic LNG Transportation Company
Assoc. Manganese Mines of South Africa, Ltd.
Associated Ore & Metal Corporation, Ltd.
Athlone Prospecting & Development Corporation, Ltd.
Avsteel SWA, Ltd.
Badger Pipeline Company
Bartow Chemical Products
Blue Grass Phosphate Company
Brazaco-Mapri Industries Metalurgicas S.A.
Century IV Associates
Chrome Deposit Corp. (Court Holdings J.V.)
City Point Oil Terminal, Inc.
CLAM Petroleum Company
Clean Air, Inc. Joint Venture
Compagnie Miniere de l'Ogoorie (Comilog)
Companhia Meriodional deMineracao
Companhia Siderurgica Paulista "Cosipa"
Cook Inlet Pipe Line Company
Deepsea Ventures, Inc.
Deutsche Transalpine Olleitung GmbH
ECOL Beverage Company of Texas
Explorer Pipeline Company
Feralloys, Ltd.
FHS Automotive Parts Manufacturing Ltd.
FHS Stahlverformung GmbH
First National Bank (Albion, PA)
Fort Meade Chemical Products

Globe Oil Company, U.S.A.
Gravcap, Inc.
Green Bay Terminal Corporation
Industria de Tubos y Perfiles, S.A. (Intupersa)
ITW-Mapri
Jupiter Mining and Prospecting Co. (Pty.) Ltd.
Kappa Mining & Prospecting Co., Ltd.
Kenai LNG Corporation
LaPointe Iron Company
Les Enterprises du Lac Lucault, Inc.
Live Oak Uranium Operations
Locap, Inc.
Loop, Inc.
Mecania Walsywa, Ltda.
Merinds Mineracao
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda.
Mineracao Maraba, Ltd.
Mineracao Xingu, Ltda.
Minerales Ordaz C.A.
Mobile (I-65) Superstructure—Joint Venture
Morrison-Knudsen, Fishback & Moore
Natkin and Company
Navios Shipholding, Inc.
Navios Corporation
Navios Ship Management Services, Inc.
Northern Tier Pipeline Co.
Oasis Oil Company of Libya, Inc.
Ocean Mining Associates—Joint Venture
Oil Insurance Limited
Oil Insurance Ltd.
Oresteel Investments (Proprietary), Ltd.
Paschen Contractors—Morrison-Knudsen
Petroleum Terminals, Incorporated
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Prieska Copper Mines (Pty.) Ltd.

P.T. Pacific Nikkel Indonesia
RMI Company
Rockland Joint Venture (Cost-Sharing)
Russell Stewart Oil Company
SID-BEC-Normines, Inc.
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinee Pour L'Explora
Des Monts Nimba (Mifuergui Nimba)
Soc. Italiana per L'Oleodotto Transalp., S.p.A.
Tenneco/USS Chemicals Joint Venture
Termerid Mineracao, SA
Ternionoss Acciai Inossidabili—S.p.A.
Tilden Iron Mining Company
Torremco Soc. Min. E. Com. Ltda.
Transalpine Finance Holdings, S.A.
Transalpine Olleitung in Osterreich GmbH
U-Save, Inc.
USS MaxTech Company, Inc.
USS MaxTech Company, Ltd.
USS MaxTech Company (Japan), Ltd.
USS-OCF-W&M Joint Venture
USS Technology (Japan), Ltd.
West Shore Pipeline Company
The West Union Canal Company
Wolverine Pipe Line Company
Zeerust Chrome Mines, Limited
Zuari Agro Chemicals Ltd.

APPENDIX IX

Mobil Oil Corporation is a wholly owned subsidiary of Mobil Corporation which is publicly held. Listed below are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation, and their affiliates and subsidiaries which are or may be publicly held. For purposes of this list only companies in which a five percent (5%) or greater interest is held are considered.

NAME OF COMPANY

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ammenn GmbH
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian Energy Company Limited, The
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.

Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Beer GmbH
Beer GmbH & Co. Mineralol-Vertriebs—KG
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Colombia, S.A.

Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colombianos Forestadores, S.A.
Colonial Pipeline Company
Comet-Brennstoffdienst GmbH
Commercial Polymers Pty. Ltd.
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania Colombiana De Forestacion S.A.
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
Corrugadora de Carton, S. A.
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
Dearborn Land Company
De. Ba. S.p.A.—Industria Petrolifero Deposito di Bari
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Pentosin-Werke GmbH

Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Etablissments Bouthenet
Ets. Le Goff
Ets. R. Saillard
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Falconbridge Limited
Felix Oil Company
Fibil, S.A.
Fibras Internacionales de Puerto Rico, Inc.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited

Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gatwick Refueling Services Limited
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
H. van der Heijden Service Stations B.V.
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imbert G. Distribution De Produits Petroliers
Inmunizadoras Unidas, S. A.
Industria De Carbon Del Valle Cauca, S.A.
Industria Interamericana De Filtros Ltda. (INTERFIL)
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Iside, S.p.A.
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
J.E.C.O.P.
K.K. Sankyo Plastics
K.K. Toresen

Kanto Kygnus Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineráloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Loba Chemie Gesellschaft mbh
Lubricantes del Sur, S.A.
Madeleine Mines Ltd.
Marcaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
McIntyre Mines Limited
McIntyre Mines (Australia) Pty. Ltd.
McIntyre Mines (Nevada) Ltd.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mertl GmbH
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Gabon

Mobil Oil Ghana Limited
Mobil Oil Maroc
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Near East Development Corporation
Neptune Bulk Terminals (Canada) Ltd.
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
Nuova Europetrol S.p.A.
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oilkol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Berau Coal
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
P.6—Groep B.V.

Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe Line Banal de La Goulette
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohol-Aufsuchungs Gesellschaft mbH
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
Sarni S.p.A.
Saudia Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The

Smoky River Coal Limited
Smoky River Investments Limited
Sociedad Calle 67, Ltda.
Sociedade Portugal Marrocos SARL
Societa Italana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Alfred Ott & Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication
De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue
du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction
"La Residence Brune"
Societe Civile Immobiliere du 10 Bd.
de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de
Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Gestion des Stocks Petroliers de Cote D'Ivorie
Societe de Manutention de Carburants
Aviation (S.M.C.A.)
Societe de Manutention de Carburants
Aviation Dakar-Yoff
Societe de Manutention de Carburants
Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour
Le Entreprises (Meple)

Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures
de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe d'Habitations a Loyer Modere
de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entroposage
de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles
de Lattaquie (Syrie) S.A.
Societe Jean Roussel S. A.
Societe Ivoirienne de Fabrication
de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage
de Produits Petroliers
Societe Malienne D'Entreposage (SME)
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle pour l'Epuration des Huiles
de Transformateurs—Septra
Societe Pizo De Formulation De Lubrifiants
(PIZOLUB)
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Strafjord Transport A.S.

Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
T. M. Duche Co., Inc.
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Maintenance Kabushiki Kaisha
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich
Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport
Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage
Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabusiki Kaisha
Walton, Gatwick Pipeline Company Limited

Werner Weidermann Mineraloelvertrieb G.m.b.H.
Western Platinum Ltd.
West Shore Pipe Line Company
Wilhelm Mertl GmbH & Co. KG
Wolverine Pipe Line Company
WSG, Warmservice Gmbh
Wyco Pipe Line Company
Wymondham Oil Storage Co., Limited
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

APPENDIX X

Murphy Oil Corporation, a Delaware corporation, is publicly held. Listed below are all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Murphy Oil Corporation.

Ozark Fuels Corporation
Butte Pipe Line Company
Collins Pipeline Company
T & M Terminal Company
Murphy Oil Company, Ltd.
Ocean Drilling & Exploration Company
Odeco Towing Services Pty.
Ben Odeco (Bermuda) Limited
Australian Odeco Pty. Limited
Ben Odeco Limited
Sub Sea Offshore (B) Berhad
Strongwork Diving (Saudi Arabia) Ltd.
Sub Sea Dolphin A/S
Lancer Services, Inc.

APPENDIX XI

The following is a list of the affiliates and subsidiaries (except those wholly owned) of Ashland Oil, Inc.

Allemania Chemical Company
American Syn-Fuels, Inc.
A M International, Inc.
Arch Mineral Corporation
Ashland Chemical Italiana S.p.A.
Target Chemicals, Limited
Ashland Coal, Inc.
Etablissement Locab
South Point Ethanol Company
Super Mom's Kitchens Company
Wipe It Off, Inc.
Ashland Industrial Corporation
Ashland Tri-State Recreation Association, Inc. (ATRA)
Associated Grocers of Iowa Cooperative, Inc.
Boyle County Industrial Foundation
Business Development Corporation of Kentucky
Business Development Corporation of North Carolina
B.V. Ashland-Suedchemie v/h Necof
Campbellsville-Taylor County Foundation
Commonwealth Oil Refining Company, Inc.
Concrete Products, Inc.
CIC Cosmetics International Corp.
Datacare, Inc.
Devon Chemicals, Inc.
Digital Application, Inc.
D M I Furniture, Inc.
The Environmental Health Association of the Carbon Black Industry, Inc.
Equal Opportunity Finance, Inc.
Atlas Pallet, Inc.
Commonwealth Lumber Company
Mt. Vernon Plastics Corporation
Ohio Falls, Inc.

Progress Supermarket, Inc.
R/T International Technologies, Inc.
Erie Lackawanna Inc.
Farmers Union Grain Terminal Association
G A C Corporation
Gravcap, Inc.
Greenville Industrial Development Co.
Hahn, Inc.
Heat Transfer Research, Inc.
Iberia Ashland Chemical S. A.
Industrial Development Corporation of Florida
Israel, State of
K D I Corp.
Kyline, Inc.
K & R Corporation
Locap Inc.
Loop Inc.
Melamine Chemicals, Inc.
Minnesota Pipe Line Company
Motel Properties, Incorporated
The Ocean Corporation
Oil Companies Institute for Marine
Pollution Compensation, Limited
Oil Insurance Limited
Orbitex, Inc.
Petroleum Club of Houston
Princeton Electronic Products, Inc.
Riverside Metal Products, Co.
Ronson Corporation
Rusco Industries, Inc.
Saudi Industrial Resins Limited
Service Stations Properties, Inc.
Seventy Sidney Corporation
Shippers & Receivers Co-op
Southeastern Investment Trust
Southern States Morganfield Co-op
S P H Hotel Company
SuperAmerica of Florida, Inc.

Tecumseh Pipe Line Company
Terex Corporation
Tygart Valley Development
United Carbon India Limited
Weseca Development Co.
Wicks Companies, Inc.
Applied Chemical Products (Pty) Ltd.
Applied Agricultural Products (Pty) Ltd.
Applied Foundry Products (Pty) Ltd.
Applied Industrial Products (Pty) Ltd.
Chematron Products (Pty) Ltd.
Ashland-Avebene S. A.
Ashland Chemical Italiana SpA.
Ashland de Mexico S. A. de C. V.
Ashland Resinas Sinteticas, Ltds.
Ashland-Suedchemie-Kernfest GmbH
Ashland-Suedchemie-Gremolith AG
George Hantos & Co. OHG
Kernfest-Webac, A.B.
Oleotecnico, S.A.
Arch Mineral Corporation
Medicine Bow Coal Company
Energy Development Co.
Crescent Petroleum Company
Ashland Oil (Nigeria) Company
Integon P & C Corporation
Delmar Plaza Associates
500 Cary Corporation
Travelers Inns of Charlotte, Inc.
Travelers Inns of Winston-Salem, Inc.
Travelers Inns of Wytheville, Inc.
Resource Sciences-Arabia Ltd.
Resource Sciences Gulf Limited
Williams Brothers Iran Consulting Engineers
Resources Sciences Malaysia Sdn. Bhd.
WICMAP Transport Pty. Ltd.
Williams Brothers Malaysia Sdn. Bhd.
Drew Ameroid Italiana S.r.l.
Pantry Pride, Inc.

APPENDIX XII

The following is a list of the affiliates and subsidiaries (except those wholly owned) of Pennzoil Company:

National Transit Company (Pennsylvania)
The Eureka Pipe Line Company
Pennzoil (U.K.) Limited (United Kingdom)
Proven Properties Inc.

APPENDIX XIII

Tenneco Oil Company is a wholly owned subsidiary of Tenneco, Inc. The following is a list of the subsidiaries and affiliates of Tenneco, Inc. except for those wholly owned.

Poclain S.A. (France)
Compania Tecnico Envasadora S.A.
Kern River Gas Supply Corporation (Delaware)
Kern River Service Corporation (Delaware)
Monroe Auto Pecas S.A. (Brazil)
Tenneco Automotive Foreign Sales Corp. Limited (Jamaica)
Collins Pipeline Company (Delaware)
Kern River Canal and Irrigating Company (California)
Alcan Ekco Limited (United Kingdom)
A/S Haustrup-Ekco Aluminium-Emballage (Denmark)
Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan)
Skogstra A/S Norway
T & M Terminal Company (Delaware)
Tenneco Insurance Ventures, Inc. (Delaware)
FC Marine Inc. (Delaware)
Mistal, Inc. (Delaware)
TENN-USS Chemicals Finance Corporation (Delaware)
Tenneco Oil Company of Nigeria Unlimited (Nigeria)
Tenngasco Gas Gathering Company (Delaware)
HT Gathering Company (Delaware)
Oasis Pipeline Company (Delaware)
Sara Gretes Cafeteria AB (Sweden)
Adela Investment Company S.A. (Luxembourg)
Omni-Pac Gmbh (Germany)
Omni-Pac S.A.R.L. (France)
P.P.M. Guindastes Hidraulicos S.A. (Brazil)
S.A. Paper Chemicals (Proprietary), Limited (South Africa)
Case Vibromax Gmbh (Germany)
Case Vibromax Gmbh und Co. (Germany)

Vibromax France SARL (France)
Vibromax SCI (France)
Case Poclain Gmbh & Co. (Germany)
Depositas Del Norte, S.A. (Spain)
Albright & Wilson (Australia) Ltd. (Australia)
Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom)
Akulu Marchon (PTY) Ltd. (South Africa)
Akulu Chemicals (PTY) Ltd. (South Africa)
Marchon-Paragon Holdings (PTY) Ltd. (South Africa)
Marchon-Paragon Sulphonation (PTY) Ltd. (South Africa)
Universal Chemical Contractors (PTY) (South Africa)
Polyphosphates Inc. (Philippines)
Albright, Morarji and Pandit Limited (India)
Arndale Fuels Ltd. (United Kingdom)
Bracey Petroleum Products Ltd. (United Kingdom)
Butler Oil Products Ltd. (United Kingdom)
Tees Storage Limited (United Kingdom)
Intertractor Viehmann Gmbh & Co. (Germany)
Stoco Mutual Water and Sewer Company (California)

APPENDIX XIV

Tosco Corporation does not have a parent company or any affiliates or subsidiaries that are not wholly owned.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
NOV 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY and TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

SUPPLEMENTAL BRIEF OF PETITIONERS MARATHON, MOBIL, AND MURPHY IN SUPPORT OF PETITIONERS

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840
(419) 422-2121

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER AND FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corpuoration

* Counsel of record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY	1
SUPPLEMENTAL FACTS	3
SUPPLEMENTAL REASONS FOR GRANTING THE PETITION	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:

In Re: Department of Energy Stripper Well Litigation, 578 F. Supp. 586 (D. Kan. 1983)	3
Tumey v. Ohio, 273 U.S. 510 (1927)	7

FEDERAL REGISTER:

50 Fed. Reg. 27400 (July 2, 1985)	5, 8

RULES:

Sup. Ct. R. 28.1	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-430

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY and TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

SUPPLEMENTAL BRIEF OF PETITIONERS MARATHON, MOBIL, AND MURPHY IN SUPPORT OF PETITIONERS

Petitioners Marathon Petroleum Company, Mobil Oil Corporation, and Murphy Oil Corporation submit this supplemental brief pursuant to this Court's Rule 22.6 to take account of events that occurred too late for inclusion in the Petition.[1]

SUMMARY

The Department of Energy's Office of Hearings and Appeals, a non-autonomous agency within DOE charged with identifying and compensating persons injured by overcharges (see Pet. 21 n. 17), was asked, in other

[1] Lists of parent, affiliate, and subsidiary companies required by this Court's Rule 28.1 appear in Appendices VIII-X to the Petition.

litigation, the same question at issue in the present case: could injured persons be determined, and restitution made, where excess charges had been imposed for crude oil. The Office of Hearings and Appeals originally concluded after lengthy hearings that injury caused by overcharges for crude oil like those at issue in the present case can be traced to particular injured persons—most particularly to refiners such as petitioners, and to direct purchasers from refiners, such as utilities and airlines. Moreover, OHA has developed an administrative mechanism to effect restitution that is administratively workable, and "yields precise numbers with a high level of confidence." Supp. App. 18a. These conclusions contradict the official DOE position, adopted by the court of appeals in the present case, that it is not possible to identify persons injured or to effect restitution.

When OHA presented these findings and recommendations within DOE, they were suppressed, not because DOE found them to be mistaken in law or fact on the record before OHA, but rather because they were inconsistent with DOE's policy of claiming that restitution is impossible. DOE intends by that policy to obtain overcharge funds for the federal treasury. Because OHA is not an independent adjudicator, DOE has been able to force it to alter its views and then has reported to the court of appeals that OHA had found restitution in crude oil cases to be impossible.

When petitioners learned this information, through letters written to DOE by a Congressman who had received a copy of the original OHA report, they brought it to the attention of the court of appeals in the form of a further petition for rehearing accompanied by a motion for leave to file the petition out of time, both filed on October 3, 1985. The motion and further petition pointed out that this information had not been available to the court of appeals when it made its decision on rehearing. The court of appeals denied the motion for

leave to file by order of October 23, 1985. Supp. App. 1a.

These events support the petition for certiorari in two fundamental ways: They further demonstrate that the court of appeals was wrong in denying petitioners and others a hearing for the purpose of establishing injury and claims to the overcharge funds—a hearing that this Court's decisions require (Pet. at 12, 20). Moreover, they support the view that governments who have not established injury are not proper claimants for restitutionary funds, since that possibility has led the federal and state governments here to favor their own interests over those whom they are by law required to protect.

SUPPLEMENTAL FACTS

1. In the Petition, at page 21 fn. 17, we referred to *In Re: Department of Energy Stripper Well Litigation*, 578 F. Supp. 586 (D. Kan. 1983), in which the District of Kansas referred to OHA the factual questions of who had been injured by charges of market rather than controlled prices for certain crude oil (charging of the market price had there been permitted by preliminary injunctions that were later overturned). That case, which involves over $1.2 billion, is one in which the DOE is arguing, on the basis of the decision in the present case, that the funds should go to the federal treasury. See Petition at 13-14, fn. 8. In furtherance of its position, the DOE submitted to that court and to the court of appeals in the present case documents purporting to represent OHA's findings and DOE's "policy statement" on those questions. Those are briefly discussed in footnotes 17 and 8 of the Petition.

2. On September 3, and 23, 1985, Rep. John D. Dingell, Chairman of both the House Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations, sent remarkable letters to the Deputy Secretary of Energy. Rep. Dingell reported that OHA had originally made findings, conclusions, and recommenda-

tions quite different from those that DOE publicly issued and supplied to the District of Kansas and the court of appeals in the present case. OHA's original findings are contained in a draft report, of which DOE had sent Rep. Dingell a copy but which DOE is withholding (in his view, without justification) from the courts and the public. Petitioners thus do not have a copy of the full original report.[2] Supp. App. at 4a-5a.

This original OHA report was drastically altered as a result of policy-level DOE meetings, and what DOE publicly presented as OHA's views was the altered version. Rep. Dingell's second letter, dated September 23, further quotes the original OHA report and provides additional details of the changes substituted at the direction of DOE officials for the OHA's original views. Supp. App. 16a ff.[3]

There are two major revelations in Rep. Dingell's letters directly concerning petitioners, who are domestic refiners, and their customers. First, a quotation from the original OHA report shows that OHA found that domestic refiners "absorbed a portion of the overcharges and should be compensated." Supp. App. 6a. OHA also found that "consumers of refined petroleum products, such as utilities and airlines, that purchased product directly from

---

[2] Petitioners are therefore unable to comment on the portions of OHA's original report not quoted by Rep. Dingell. However, the quoted portions establish that OHA concluded that identification of injured persons could be achieved, that refiners and their direct customers were injured, and that an accurate and practical mechanism for restitution is possible. It is on those quoted portions that we rely here.

[3] A copy of Rep. Dingell's September 3 letter was obtained by undersigned counsel late on September 9. The Petition was due to be filed on September 14. While it may have been possible to include some mention of that letter in the Petition, we thought it appropriate to apply first to the court of appeals, and we informed the Clerk of this Court of that possibility in the cover letter accompanying the Petition. Of course DOE's response to Rep. Dingell and the Congressman's second letter, dated September 19 and 23, were not written until after the Petition had been filed.

refiners" could and should be compensated as well. *Id.* A further quotation reveals that, based upon its analysis of the economic data, OHA found that "marginal economic analysis [the method of economic analysis considered by OHA at the hearing that OHA found most helpful] answers the appropriate question in this proceeding, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase." Supp. App. 18a. OHA concluded that this analysis "yields precise numbers with a high level of confidence." *Id.* This is exactly the opposite of the conclusions that the court of appeals accepted at DOE's urging. Ex. App. 88a ff.[4]

Second, OHA's original report included "recommendations for a restitutionary mechanism which can be implemented efficiently." Supp. App. 6a. OHA reports that this mechanism is "administratively workable," that it "provides for processing of refund applications" filed by crude oil purchasers, refiners, and "consumers of refined petroleum products that purchased those products directly from refiners." Supp. App. 20a. Such applications "can be accepted promptly upon announcement of a payment proceeding." *Id.* at 20a-21a. Thus, the portions of the original OHA report quoted by Rep. Dingell make clear that the OHA concluded that restitution was practically, as well as theoretically, possible. OHA felt itself ready, willing, and able to take on the task.

---

[4] The OHA hearings did not take evidence on whether resellers, retailers, and their purchasers were injured and could be compensated, leaving that question for further hearings. Supp. App. at 6a.

Similarly OHA refused to take evidence on injury to specific refiners, leaving that question as well to future hearings. DOE's observation, in its "policy statement", that injury to individual refiners had not been established (50 Fed. Reg. at 27401) is therefore misleading. The fact that OHA recommended a mechanism for compensation of individual refiners shows that the Office concluded that individual determinations were possible.

DOE's response to Rep. Dingell's first letter actually confirms his allegations (Letter of Sept. 19, 1985, Supp. App. 10a ff.). DOE did not dispute that OHA originally reached all the conclusions that Rep Dingell asserts. Indeed, DOE admitted that on the basis of the evidence before it OHA both concluded that identification of persons injured by crude oil overcharges is possible and recommended a mechanism for restitution. Supp. App. 10a-11a. DOE further admitted that it changed OHA's recommendations "as a matter of policy," supporting that change with a citation to TECA's conclusion in the present case that the task is impossible. *Id.* at 11a, 12a.

On October 3, 1985, petitioners Marathon, Mobil, and Murphy sought to bring these matters to the attention of the court of appeals by filing a further petition for rehearing and a motion for leave to file that further petition out of time. We pointed out that none of this information had been available to the court of appeals when it made its decision in the case. The motion for leave to file out of time was opposed by the DOE and by 27 states. The DOE's opposition sought to make a virtue of necessity. It stressed that OHA is not autonomous, and that OHA's original decision was of course subject to review by policy officials like the Secretary or the General Counsel. Supp. App. 25a.[5] In so arguing the DOE reinforced the conclusion stated in its letter to Rep. Dingell that OHA's original findings and recommendations, based on a hearing record, were required to be altered only for "policy" reasons—because the government prefers getting overcharge funds itself over having injured persons identified and restitution paid to them. The court of appeals denied the motion for leave to file the further petition out of time by a one-sentence order containing no explanation on October 23, 1985. Supp. App. 1a.

---

[5] The supplemental appendix contains an excerpt from the DOE's opposition. A full set of the petitioners' motions and the oppositions of the DOE and the states has been lodged with the Clerk.

SUPPLEMENTAL REASONS FOR GRANTING THE PETITION

This supplementary information strongly supports the petition for certiorari.

1. These events underscore the correctness and applicability of this Court's holdings insisting that a court should hold a hearing participated in by all persons claiming injury before deciding a remedy issue such as the present. Petition at 12, 20. If OHA, after taking evidence on this subject, thought that identification of injury and an appropriate remedy are possible, then it was even more plainly wrong for the court of appeals to deny persons claiming injury the opportunity to submit evidence to prove it. Nor do we assert that the original OHA report (or the portion of it quoted by Rep. Dingell) is conclusive in itself. Rather, this information underscores the correctness of the requirement that the issues of injury should not be held to be foreclosed without opportunity for a hearing. The evidence that originally convinced OHA might well convince a tribunal that is not obliged to defer, off the record, to one of the claimants.

2. It can be seen from these events that the government's hopes and plans of ending up with crude oil overcharge funds are not only in apparent conflict with, but have actually supplanted, any attempt by the government to pursue its duty of enforcing the law so as to identify and compensate those injured by the overcharges. An agency truly attempting to pursue those goals would not have squelched and hidden a report of the sub-agency most expert in such matters, made after a lengthy hearing, concluding that identification of persons injured and accurate restitution were possible. The conflict between impartial enforcement on the one hand and the possibility of adding funds to the government's coffers on the other, identified in *Tumey v. Ohio*, 273 U.S. 510, 534 (1927), is unfortunately not merely apparent, but real. The court

of appeals failed to perceive that the government's plan to end up with the money gives it a financial interest in defeating the very claims that by law it should be using its power and expertise to vindicate. This Court should grant certiorari to establish that for this reason, absent a statute or injury to itself, the government cannot become a claimant in restitution.[6]

---

[6] In the present case the states, rather than the federal government, are the beneficiaries of the judgment. That does not change the need for review. First, the states are themselves unauthorized by statute to claim the funds and are not entitled to restitution because they have not even sought to show injury (see Petition at 15-16). Moreover, the DOE's dual role is still more than sufficient ground for reversal. The court of appeals has endorsed a general proposition that governments may claim restitutionary funds, clearly leaving the door open to the federal government as a claimant in future cases (Ex. App. 92a). DOE is, admittedly, pushing on toward that goal, and the decision of the court of appeals in the present case is already being used by DOE to support that effort. See p. 6 *supra*. It is only because the possibility of even attempting restitution to injured persons has been eliminated by the present holding that the federal government is able to pursue its goal of obtaining awards in future cases. See the DOE's "Policy Statement", 50 Fed. Reg. 27400, 27402, Col. 3 (July 2, 1985), discussed in the Petition at 13. Indeed, the Office of Hearings and Appeals, under the overt compulsion of the "Policy Statement", simultaneously and dutifully announced that it is awarding all crude oil overcharges to the federal government. *Id.* at 27402-03. See Pet. 20-21.

CONCLUSION

For the foregoing reasons, in addition to those given in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840
(419) 422-2121

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER AND FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corpuoration

* Counsel of record

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. DC-91 through DC-100

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EXXON CORPORATION,
Defendant-Appellant.

Before: HONORABLE WILLIAM H. BECKER, HONORABLE WESLEY E. BROWN and HONORABLE ROBERT EARL MAXWELL, Judges.

ORDER

Upon consideration of Intervenors-Appellants, Marathon Oil Company, Mobil Oil Corporation and Murphy Oil Corporation, motion for extension of time to file a petition for rehearing, time having expired as designated in Rule 40, Federal Rules of Appellate Procedure, and oppositions to said motion filed by Appellee, the United States of America, and by Intervenor-Appellee, "The States," it is hereby

ORDERED that said motion is DENIED.

FOR THE COURT:

/s/ Donna M. Bold
DONNA M. BOLD
Clerk

October 23, 1985

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON ENERGY AND COMMERCE
Washington, DC 20515

September 3, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Thank you for your August 20, 1985 reply to my letter of July 30 in which I expressed considerable disagreement, based on the record of investigations by this Subcommittee and the General Accounting Office (GAO), with the June 21, 1985 "Statement of Restitutionary Policy" issued by you in conjunction with the issuance by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) of its June 19 report concerning the *Stripper Well* litigation.

It is disturbing that you and the DOE counsel do not want to present to the court a complete story concerning DOE's restitutionary practices, together with the views of the Chairman of the House Committee with legislative and oversight jurisdiction over your Department and this program. Presenting one side only misleads the court and could cause the court to decide on the mistaken belief that Congress and the DOE are in accord with this matter. I urge you to reconsider this matter before September 16.

As part of your reconsideration, I urge you to consider the following comments.

As you know, as long ago as March 14, 1985 I wrote to the Secretary of Energy (copy attached) about the OHA report and expressed concern about the status of the OHA report. In that letter, I said:

> If, despite this letter, anyone at DOE reviews or coordinates the OHA report, the Subcommittee expects to receive from OHA not only the final version, but also the OHA draft version, and from the DOE, the identity of all persons inside or outside DOE who reviewed the OHA draft report. No one should destroy the evidence this time.

After receiving an April 2 reply from Mr. Rayburn Hanzlik in which he indicated that an "internal review process" of the OHA Secretary on April 9 (copy enclosed). I said:

> The Subcommittee specifically reiterates its earlier request that each draft of the report (including any recommendations)that is made available to *anyone* outside of OHA be retained and provided to the Subcommittee after the report is issued.

I subsequently learned through our investigation of this matter that a draft report was prepared by OHA and given, as part of the "internal review process" dictated by DOE officials, to several such officials in early April. I also learned that DOE officials met in April and early May regarding this report. At those meetings, these officials made their views known to the OHA about the report.

Subsequently, the DOE received an order dated May 7, 1985 from the court confirming the claims in my March and April letters, that this was to be a report by OHA, not DOE. Accordingly, on June 13, 1985 Secretary Herrington wrote (copy enclosed) assuring me that DOE will comply will the court's order. He said:

> OHA will report the results on its fact-finding on the tracing of the overcharges without editing or

> modification by other parts of the Department. The Department will also provide its recommendations to the court, but the exact way in which this will be done has not yet been finally determined.

Unfortunately, as I show in this letter, the damage was done *before* issuance of the court's order. The OHA had been beaten into submission by the "internal" process described by Mr. Hanzlik. Its draft report was not liked by the DOE officials. This was understood by OHA and it was re-written to be a more bland report with a fact finding more to the DOE's liking.

When the report was issued in June, Mr. James U. DeFrancis of the DOE provided a copy to the Subcommittee by letter of June 24. On July 30 I wrote Mr. DeFrancis (copy attached) thanking him for the report and reminded the DOE of my earlier request for copies of the draft OHA report and the identity of the officials outside OHA who received that draft. On August 20 the OHA wrote to me "in response" to my letter to Mr. DeFrancis and provided a copy of the draft report.

The OHA said:

> Only one draft was circulated to persons outside of the Office of Hearings and Appeals. On April 1 1985, we provided five copies of this draft to the Administrator and Deputy Administrator of the Economic Regulatory Administration. Subsequently, we supplied one copy of the draft to the Assistant Secretary for Congressional, Intergovernmental and Public Affairs. We understand that ERA subsequently provided copies to the Office of General Counsel and to the Deputy Secretary.
>
> A copy of this draft is enclosed. The information contained in this document is of a sensitive nature, representing the predecisional processes of the agency, and is exempt from mandatory public disclosure pursuant to Exemption 5 of the Freedom

> of Information Act, 5 U.S.C. Sec. 552(b)(5). We request that the Subcommittee exercise special care in the storage and handling of this draft to ensure its confidentiality and to protect against disclosure.

Let me state first that I disagree with the DOE claim of exemption from public disclosure, as this report was always to be a reply to a court order. *No* agency "pre-decisional process" was intended by the court (as is clear by the court's May 7 order which was nothing more than a restatement of its first order), although the DOE and OHA *improperly* went thru such a process prior to the May 7 order. Indeed, there never should have been any such "internal review process". No DOE policy was involved. DOE was free to adopt whatever policy, position, or decision it wanted separate from the court-ordered report. The Freedom of Information Act was not intended to exempt from disclosure documents of this nature. The OHA misapplies the Act in this case.

In regard to the draft OHA report, it is substantially different in content, substance, and tone (from introduction to end) from the final OHA report. Indeed, the very first paragraph of the "Introduction" of the draft report differs (after the second sentence) from the public report.

The public report states:

> On May 7, 1985, the District court issued an order which clarified the manner in which the fact-finding report from OHA was to be submitted. *In re: The Department of Energy Stripper Well Exemption Litigation*, MDL No. 378 (D. Kan., May 7, 1985) (order denying motion to expedite issuance of OHA's report). In that decision, the court ordered the OHA to issue its findings of fact of the tracing and impact of the overcharges in one separate report editing or modification by the DOE. *Id., slip op.* at 7. Recognizing that the DOE's position on the

utility of further efforts by the OHA and a recommended plan of restitution was a matter of agency policy, the court directed that these concerns be addressed in a second report "which shall be issued separate from the report of the OHA's fact-findings." *Id.* This report sets forth the OHA's analysis and findings of fact regarding the absorption of the impact of these crude oil overcharges by the U.S. domestic refining industry.

The draft report states:

> This report sets forth findings of fact regarding the absorption of the impact of crude oil overcharges by the U.S. domestic refining industry. The ultimate conclusion is reached that members of the refining sector of the domestic petroleum industry absorbed a portion of the overcharges and should be compensated. It also includes recommendations for a restitutionary mechanism which can be implemented efficiently. The refund mechanism which is recommended to the court would apply to refiners, other Entitlements Program participants, and consumers of refined petroleum products, such as utilities and airlines, that purchased product directly from refiners. It does not cover resellers or purchasers of products from resellers.

Most importantly, the OHA Findings of Fact set forth in the public report differ from those in the nonpublic draft. Further, a whole chapter entitled "V. Standards for the Fact-Finding Process" is omitted in the final report. In addition, the public report ends with the Findings of Fact, i.e. chapter VI. The draft report does not. It includes another chapter entitled "VIII. Recommendation of Restitutionary Mechanism."

All of these changes were apparently made as a result of the negative attitude expressed by DOE officials, such as yourself, after April 1 to the draft OHA report

as part of DOE's improper "internal review process". OHA, which, of course, is *not* truly independent of the Deputy Secretary, the General Counsel or other DOE officials, apparently caved under the pressure exhibited through this negative attitude of DOE officials and rewrote the draft to de-tone it, eliminate two whole chapters, and *change the findings*. The very thing I feared and predicted in my correspondence in March and April occurred. In my view, that action (under your auspices and other DOE officials) was in violation of both the spirit and words of both court orders.

The OHA was not allowed to be a free agent. Indeed, OHA personnel were, as expected, "good soldiers" and adhered to the DOE policy-line, i.e. bring this program to an end, do nothing to require more resources that could extend the program, and most importantly, use these funds to reduce the Federal budget deficit in the name of restitution. OHA had no choice because OHA lacked support at DOE for a refund policy.

I again request that you provide before September 16 a copy of my letter of July 30 to the court, together with this letter, and a copy of the OHA draft report.

Such disclosure is necessary not because the final report failed to include OHA's draft Chapter VIII, although I believe it properly should have been included because (despite OHA's mistaken characterization of the chapter as "policy") it informs the court on how to implement an administrative refund process, but because the fact finding of OHA was changed even slightly and a whole chapter relating to that fact finding was deleted after the OHA released the report to you and other DOE officials. Once that change occurred, the report lost its character as an OHA report, even though the mechanics of change were undoubtedly done by OHA and not the DOE officials. The DOE officials' interference did not stop at chapter VIII. It extended to the body of the report and the Findings of Fact. The court needs to be

aware of this. Even with this knowledge, the court may adopt your policy. But without it, the court will be misled by the public report.

In addition, I request that you provide:

(a) a list of *all* persons within DOE (other than OHA) and at other agencies who received a copy of the April 1 draft or any later draft,

(b) a list of the dates of all meetings concerning this report and the identity of the participants,

(c) an explanation why the assurances provided by the Secretary to me were apparently ignored by DOE officials in regard to this draft, and

(d) a copy of all memoranda, notes, and other documents (including marginal notes on each copy of the draft) prepared by DOE officials outside OHA regarding this report.

In conclusion, it is not my intention at this time to release this draft report. I believe that the OHA and DOE has an obligation to do so. But I will consider that view, depending on your response to me, after September 16. I understand that the court has set September 22 as the next date for briefing on these matters. Clearly, the court should be informed of these matters by then.

Sincerely,

/s/ John D. Dingell
JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosures (4)

cc: Honorable Philip R. Sharp Chairman
Subcommittee on Fossil and Synthetic Fuels

Honorable Edward J. Markey, Chairman
Subcommittee on Energy Conservation and Power

Honorable James T. Broyhill,
Ranking Minority Member
Subcommittee on Oversight and Investigations

Honorable James A. McClure, Chairman
Senate Committee on Energy and Natural Resources

Honorable J. Bennett Johnston,
Ranking Minority Member
Senate Committee on Energy and Natural Resources

Honorable William H. Gray III, Chairman
Committee on the Budget

Honorable Sidney R. Yates, Chairman
Subcommittee on Interior and Related Agencies
Committee on Appropriations

Honorable John S. Herrington, Secretary
Department of Energy

Honorable Joseph R. Wright, Jr., Acting Director
Office of Management and Budget

Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

Honorable John Carlin, Chairman
National Governor's Association

Honorable Francis X. Bellotti
Attorney General of Massachusetts
President
National Association of Attorneys General
444 North Capitol Street, N.W., Suite 403
Washington, D.C. 20001

Honorable Rayburn Hanzlik, Administrator
Economic Regulatory Administration

Honorable George B. Breznay, Director
Office of Hearing and Appeals
Department of Energy

[SEAL]

THE DEPUTY SECRETARY OF ENERGY
Washington, D.C. 20585

September 19, 1985

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of September 3, 1985, concerning the *Stripper Well* litigation.

Your letter again expresses your disagreement with the Department's position regarding the remedy in the *Stripper Well* litigation, notes that the final Office of Hearings and Appeals (OHA) Report differs in some respects from the April 1 draft, and questions the propriety of the changes made by the OHA. You have also renewed your request that the Department present to the Court both your views concerning the remedy in this case, and the initial draft of the court-ordered report prepared in OHA that was furnished to you previously (the April 1 Draft) which contained, in addition to draft findings of fact, draft recommendations for further administrative proceedings.

Initially, I would like to address the concern you directed to the changes that OHA made between its initial draft and the final report. While, as you note, the tone may differ, the substance of the factual findings is exactly the same. When the District Court in the *Stripper Well* litigation issued its May 7, 1985 Order requiring the OHA Report to be confined to fact-finding and

the Department to submit its policy recommendation separately, it became necessary for OHA to revise the April 1 Draft. This was because OHA had initially drafted a single report that had interwoven OHA's factual findings with OHA's initial suggestions as to possible policy recommendations that might be adopted by the Department as a whole.

In accordance with the Court's May 7 Order, OHA then proceeded to make such changes as it deemed necessary to prepare a final fact-finding report and to delete from its report any policy or other recommendations. Any particular changes in fact-finding, which are minor, we are assured by OHA resulted solely from its normal internal review and simply reflect the preliminary nature of the April 1 draft. Indeed, the particular changes you called to my attention in your letter are on their face policy recommendations, not factual findings. This is indicated by the title of Chapter VIII of the April 1 Draft, "Recommendation of Restitutionary Mechanism." Similarly, the Introduction to the April 1 Draft, also quoted in your letter, uses the word "recommendation" twice and the recommendatory wo d "should" once in its five short sentences. Given the Court's May 7 Order, such recommendations and policy decisions simply had no place in the fact-finding re ort. The changes that OHA made to confine itself to the facts that it found on the record of its proceedings were made to comply with Judge Theis' Order.

Whatever few changes made to the substance of the factual determinations as OHA proceeded from the April 1 Draft to the final Report were made entirely within OHA and without review, approval or other such involvement by persons outside OHA. I am assured by the Director of the OHA that the findings of fact were made in strict compliance with the Court's May 7 Order.

The final policy recommendations, on the other hand, were those of the Department as an institution, which is

what the District Court ordered. Based on the facts found by OHA, the Department as a matter of policy rejected the proposal in the April 1 Draft to conduct further proceedings in an attempt to do the impossible. This decision is set forth in the Department's Statement of Restitutionary Policy and is consistent with the views of the Temporary Emergency Court of Appeals (TECA) as expressed in *United States v. Exxon Corp.*, Nos. DC-91 through DC-100 (July 1, 1985), where the Court held that any effort to trace increased crude oil costs attributable to the similar overcharges in Hawkins Field "would be futile" (Printed Slip Op. at 92), and "impossible" (*id.* at 94).

For convenience of reference, the responses to your specific questions follow the alphabetic designation assigned in your letter.

(a) The Director of the Office of Hearings and Appeals advises me that only the April 1 Draft was given to anyone outside OHA. Other than the copy which was sent to your Committee, no copy of the April 1 Draft was given to any person outside the Department of Energy. Within the Department, copies were provided to me; to the Assistant Secretary for Congressional, Intergovernmental and Public Affairs; the Administrator and Deputy Administrator of the Economic Regulatory Administration (EPA); the Director of Enforcement, ERA; the Chief Counsel for Administrative Litigation, ERA and a member of his staff; the Chief Counsel for Judicial Litigation, ERA, and several members of his staff; the General Counsel; the Deputy General Counsel; and the Acting Deputy General Counsel for Litigation and several members of her staff. Each has indicated that he or she caused no circulation outside the group named.

(b) There were numerous meetings among various of the persons listed in (a), above, to discuss the Report and the Statement of Restitutionary Policy, and it is not feasible to attempt to reconstruct all such meetings. We

did not learn of the Court's Order until May 13, when we received a copy in the mail. Prior to that time, there were two meetings involving representatives of the Office of Hearings and Appeals and DOE officials outside that office at which the April 1 Draft was discussed. The first meeting on May 7 involved me and representatives of most of the offices listed in (a), above. The second meeting, on May 10, was attended by me and the Director of Hearings and Appeals. There were no discussion meetings outside OHA subsequent to learning of the Court's Order.

In the week of June 17, before issuance of the final report, the Director of OHA advised me, the Assistant Secretary for Congressional, Intergovernmental and Public Affairs, and the General Counsel that the final report had been prepared in compliance with the Court's May 7 Order and would be issued prior to the Court-imposed deadline.

(c) As noted above, the Director of OHA advises me that OHA's findings of fact contained in its Report were prepared in strict compliance with the Court's Order without editing or modification by other parts of the Department and are based solely upon the record of the proceeding OHA conducted. Thus, no DOE officials ignored the assurances in the Secretary's letter of June 13.

(d) We have found no memoranda, notes or other documents (or copies of the April 1 Draft containing marginal notes) prepared by DOE officials outside OHA regarding the Report.

Your letter raises two other matters that I should address:

First, we must again respectfully decline your request that we file your letters (or drafts of the report) with the Court. Courts have repeatedly held that the views of individual members of Congress, even if they are committee chairmen, are to be given no weight in construing

or applying Federal law, except as they may be part of pre-enactment commentary on legislation being enacted, so that the Courts can discern the views of the Congress as a body at the relevant time of its adoption of legislation. In any event, counsel for the refiner-plaintiffs in the *Stripper Well* litigation attached a copy of your September 3 letter to their Motion to Amend Scheduling Order filed with the Court on September 12, 1985. Your July 30 letter is referred to in the September 3 letter and if those who agree with your position believe it helpful to them they will, no doubt, call it to the Court's attention. In this manner, both your position and the General Accounting Office's (GAO) recommendations on the appropriate way to make restitution were called to the attention of the court in *United States v. Exxon Corp.* (See letter to the Clerk of Temporary Emergency Court of Appeals from counsel for the National Oil Jobbers Council and the Jobber's Group dated March 13, 1985). Additionally, the question of whether the April 1 Draft should be made available to the parties is now before the Court on a discovery motion, and that matter will be decided in the litigation.

Second, I urge once again that you maintain the confidentiality of the April 1 Draft in your possession which contains neither the final views of OHA nor of the Department. The courts repeatedly have held that drafts are inherently predecisional and hence not subject to disclosure under the Freedom of Information Act. The fact that OHA prepared the report in a capacity that the Court has suggested is similar to that of a Special Master does not change this result. There is no basis to claim that drafts of judicial opinions or special masters' reports are subject to disclosure. A general practice of disclosing drafts would make government employees less apt to put into writing their initial, tentative views. The deliberative process would be seriously impaired as a result.

Finally, I reiterate our continued belief that further legislative guidance concerning the disposition of overcharge funds that cannot be traced to the parties injured is most desirable. The Policy Statement to which you object proposes to defer unilateral action by the Department under current law in order to afford Congress a further opportunity to address this matter. The crude oil overcharge funds would be deposited in the United States Treasury only if Congress declines to act. The Department is more than willing to work with the Congress to obtain appropriate legislation on this matter. We hope that you will work with the Department to develop a prompt, sure remedy that serves the public interest.

I trust these responses will allay any concern that you might have had regarding the process by which the OHA Report was prepared, for all of its factual findings were entirely the products of OHA's independent formation and review of its record in this matter.

Sincerely,

/s/ Danny J. Boggs
DANNY J. BOGGS

cc: Honorable James T. Broyhill
Ranking Minority Member

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON ENERGY AND COMMERCE
Washington, DC 20515

September 23, 1985

Honorable Danny J.Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Except to the extent your September 19, 1985 reply to my September 3 letter identifies the numerous persons (outside the Office of Hearings and Appeals (OHA)) who were given copies of the April 1, 1985 OHA draft *Stripper Well* report and lists some of the "numerous meetings" by you and others in the Department to "discuss the Report and the Statement of Restitutionary Policy", your letter is somewhat misleading. Let me explain why I believe that to be the case.

First, you agree that the final OHA report and the April 1 draft "differ" in tone, but you contend that the "substance of the factual findings is exactly the same." Your interpretation and mine of what is encompassed by the word "substance" may differ. However, I believe it relevant to point out that the "words" and "emphasis", not just "tone", were changed significantly. For example, the publicly released June 1985 report states (pp. 77-78):

> Each of the methods presented for determining who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods—refiner per-barrel profit analysis—is not relied upon

in this Report, except as part of the "big picture." The other—an analysis of refiner cost banks—is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. Although marginal economic analysis rests upon assumptions and estimations, we find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers an appropriate question, namely, to what extent did product prices rise when the refining industry experienced small crude oil cost increase. It does not, however, answer the question with respect to any particular firm. As noted previously in this report, to determine the extent to which a particular refiner passed through the impact of the MDL 378 overcharges, a number of factors specific to the operations of that refiner must be analyzed. We know of no methodology that would accomplish analyses of those factors, and no party in this proceeding has suggested such a methodology. Marginal economic analysis analyzes industry-wide data and produces results which estimate the *average* amount of cost absorption by refiners as a class. The impact sustained by individual refiners will, of course, vary from the industry-wide average.

The comparable paragraph in the non-public April 1 draft report is shorter. It states (p. 73):

> Each of the methods presented for our use to determine who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods—refiner per-barrel profit analysis—is not relied upon in this determination, except as part of the "big picture." The analysis of refiner cost banks

> is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. We find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers the appropriate question in this proceeding, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase. It also yields precise numbers with a high level of confidence.

Whether these and other changes in words and emphasis are "substantial" or not is a question for all to judge (particularly the Court), not just the Department of Energy (DOE). You are asking the Court, the parties, the public and this Subcommittee to accept your judgment on faith of what is substantial. But your judgment is colored by your desire to have your policy adopted. By keeping the contents of the draft locked up at DOE, you want to leave all in the dark as to alternatives. I believe the Court and the public, not you, should decide this matter.

I point out one word change in the above paragraphs that, I believe, changes the emphasis significantly. The fifth sentence of the both paragraphs is virtually identical. The difference lies with a change of an article "an" to "the". Thus, the public report states the "marginal economic analysis answers *an* appropriate question", while the draft states it "answers *the* appropriate question". Is that "minor"? Is the "substance exactly the same"? The court could easily conclude "No it is not," particularly in light of other changes in the paragraph.

There are other significant changes in the findings. Most importantly, chapter V (deleted in the final version)

indicates the standards used by the OHA in its fact-finding. Your letter does not discuss that deletion. I feel certain that the Court, the parties, and the public would welcome this information and consider it "substantial" to the fact-finding.

Second, you state:

> Whatever few changes made to the substance of the factual determinations as OHA proceeded from the April 1 Draft to the final Report were made entirely within OHA and without review, approval or other such involvement by persons outside OHA. I am assured by the Director of the OHA that the findings of fact were made in strict compliance with the Court's May 7 Order.

Clearly, there were far more than a "few changes" to the entire report, even though all such changes were, as you state, "technically" made "within OHA". While I am certain that the OHA Director honestly believes that the findings were "in strict compliance" with the Order, the fact remains that between April 1 and May 7, the DOE had ample opportunity, as your letter shows, to "influence" the changes. The May 7 and 10 meetings were clearly fresh in the OHA Director's mind when the changes were made. The dye was cast by the time you and he learned of the May 7 Order. DOE did not like OHA's report or any recommendation for further proceedings. The Treasury's solution was the DOE policy. The report needed change to allow that policy. Indeed, *all* of the changes seem to coincide neatly with that view as expressed in your June policy statement. By indirection, the OHA Director re-worked the draft to make it bland and "in synch" with your "policy".

Third, your letter interprets the Court's May Order very conservatively by saying: "Given the Court's May 7 Order, such recommendations and policy decisions simply had no place in the fact-finding report." Earlier your

Department bent over backwards to interpret the Court's first Order liberally as giving DOE wide leeway to review the report and make changes.

However, the May 7 Court Order did not change the earlier Order of the Court where, as noted by OHA in the draft report, the Court said it "will also welcome the views of the OHA on how restitution can best be achieved in this case." The Court encouraged OHA to make recommendations or views on restitution. OHA did so in the draft report which you are seeking to withhold from the Court and the public. The May 7 Order supplemented the 1983 Order. It did not change it. It made clear, however, that review and change by DOE was improper.

In the May 7 Order, the Court said:

> This Court referred this legislation to the OHA only to take advantage of the procedures and expertise which the OHA had developed in tracing the impact of overcharges on the oil industry. This litigation was referred to the OHA for its determination of which parties had suffered injury in what amounts. That determination is solely a question of fact. *The Court did not intend to allow the DOE to make the policy decisions on whether such an attempt at tracing is feasible or how to actually make restitution, although the Court is interested in the DOE's position on these matters.* (Underlining supplied)

Chapter VIII of the April 1 draft OHA report states:

> *The following sections present a restitutionary mechanism to implement the factual findings contained in this determination which we believe is administratively workable.* The mechanism provides for the processing of refund applications filed by direct purchasers of MDL 378 crude oil, Entitlements Program participants, and consumers of refined petroleum products that purchased those products directly from refiners. These applications can

be accepted promptly upon announcement of a payment proceeding. We recognize that this undertaking will require the dedication of significant resources. *If directed by this Court, the Office of Hearings and Appeals is ready to assist in this endeavor.* (Underlining Supplied)

While the Court may disagree, I believe that the OHA recommendation is, in effect, an OHA view on "how to actually make restitution", based on its fact-finding. So long as you refuse to allow OHA to release its draft, the Court will never have the opportunity to agree or disagree. Again, I urge that, as a minimum, you release the April 1 draft to the Court. Let the Court decide its value.

Since receiving your September 19 letter, I received the enclosed September 12 Order by Judge Frank G. Theis. Strangely, you mention that the "question of whether the April 1 Draft should be made available to the parties is now before the Court on a discovery motion," but you did not mention the September 12 Order. Please provide a copy of your reply to that Order.

In view of the fact that the Court is now aware of the April 1 draft and has issued the September 12 Order, I will not, at this time, release the draft report. I am not, however, convinced by your arguments for nondisclosure and will probably release the draft report if you do not furnish it to the Court pursuant to the September 12 Order. I believe your reasons for wanting to retain "confidentiality" have nothing to do with protecting even a modicum of the "deliberative process," but are aimed at preserving your Federal deficit cutting, nonrestitutionary policy of last June. The so-called "deliberative process" would *not* "be seriously impaired" by disclosure of the draft to the Court. In fact, the extent to which the April 1 draft was widely circulated within the DOE, (in violation of the Court's Order of 1983)

makes a mockery of that process, particularly insofar as you equate the OHA process with that of a "Special Master." I have never known a Special Master to have his drafts reviewed extensively by persons not under with the Special Master.

In your reply on page 3 of your letter, you state there were "numerous meetings" to discuss the report and the "Statement of Restitutionary Policy". When was that policy prepared and first circulated? Who received it? Was a draft of it provided in any form to the OHA Director at the May 7 or 10 meetings? When was the Director first made aware of the policy? What were the nature of the May 7 and 10 discussions which you attended?

Finally, I note your continued refusal to file my letter with the Court. You state:

> Courts have repeatedly held that the views of individual members of Congress, even if they are committee chairmen, are to be given no weight in construing or applying Federal law, except as they may be part of pre-enactment commentary on legislation being enacted, so that the Courts can discern the views of the Congress as a body at the relevant time of its adoption of legislation.

If this is so, then I wonder why you have declined to make my views known to the Court. If, as you state, the Court will give my views on DOE policy "no weight," so be it. There can no harm to DOE in providing them so they will be before the Court. The Court, of course, is free to reject, ignore, or consider them.

You note that one of the parties attached a copy of my September 3 letter with their motion. That is interesting. However, I prefer that the Government, not a private party, as a courtesy provide my views to the Court. I do not think it unreasonable to ask that you

extend this courtesy to me or any other Member of Congress.

I again urge that you release the April 1 draft to the Court and that you provide my letters to the Court, including this letter.

I request your reply by October 7, 1985.

Sincerely,

/s/ John D. Dingell
JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Invesigations

Enclosure (1)

cc: Honorable James T. Broyhill
Ranking Minority Member

Honorable John S. Herrington, Secretary
Department of Energy

Mr. Marshall Staunton, Acting Administrator
Economic Regulatory Administration
Department of Energy

Honorable George B. Breznay, Director
Office of Hearings and Appeals
Department of Energy

Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

M.D.L. No. 378

IN RE: THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION LITIGATION

ORDER

Upon consideration of the Motion to Amend Scheduling Order and the Request for Production of Documents and Motion to Shorten the Time to Respond filed herein by the Refiner-Plaintiffs;

IT IS HEREBY ORDERED:

1. The Department of Energy shall respond to the Refiner-Plaintiffs' Request for Production of Documents within ten (10) days from the date hereof.

2. The time for all parties to comment on or object to the Report of the Office of Hearings and Appeals is hereby extended thirty (30) days to October 23, 1985.

IT IS BY THE COURT SO ORDERED.

DATED September 12, 1985.

/s/ Frank G. Theis
FRANK G. THEIS
U.S. District Court
Senior Judge

EXCERPT (pp. 3-4) FROM DOE OPPOSITION TO PETITIONERS' MOTION TO FILE FURTHER PETITION FOR REHEARING OUT OF TIME IN THE COURT OF APPEALS

In addition, Intervenor-Refiners' "surprise" that other parts of the Department reviewed the preliminary recommendations made by certain OHA employees concerning possible restitutionary mechanisms in a different case is, at best, contrived and does not present a change of fact or law. From the beginning, DOE acknowledged in that case that OHA would consult with other parts of the agency in preparing its report in the *Stripper Well* case.[4]

Indeed, the district court in that case explicitly sanctioned that consultation regarding "whether intelligible progress can be made" on tracing the total or partial impact of the overcharges and "how best to achieve restitution" as not only appropriate but necessary. *In re: the Department of Energy Stripper Well Exemption Litigation*, 608 F. Supp. 1104, 1107 (D. Kan. 1985).

---

[4] *See, e.g.*, Department of Energy's Response to Plaintiffs' Second Set of Interrogatories and Request for Production of Documents at 11 ("The DOE's Office of General Counsel is authorized to provide legal advice to OHA in connection with Subpart V refund proceedings, and has generally done so."), 12 (DOE agreed that "the Secretary of Energy or his delegate has the authority to veto, concur in, or modify a tentative, preliminary, draft, or final decision in a Subpart V proceeding or in any other type of refund distribution proceeding conducted by OHA."); Transcript of June 6, 1983 Hearing at 52 (counsel for DOE acknowledges that "some DOE attorneys advise OHA [in refund proceedings], that's no secret."), at 58 (counsel for plaintiffs, which includes many Intervenor Refiners in this case, complains that "OHA is not an independent arm, . . . but instead is subject to various restrictions from the Secretary of Energy and is also subject to advice from the Office of General Counsel").

Accordingly, Intervenor Refiners' motion for leave to file further petition should be denied.

Respectfully submitted,

/s/ Thomas C. Newkirk
THOMAS C. NEWKIRK
MARCIA K. SOWLES
ARTHUR S. WEISSBRODT
JOSEPH L. GIBSON
GILBERT T. RENAUT
RODNEY SOLENBERGER
Office of Judicial Litigation
Economic Regulatory Admin.
Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585
(202) 252-5127

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-429, 85-430, 85-432, 85-440 and 85-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EXXON CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

FRANCIS X. BELLOTTI
Attorney General
of Massachusetts
GEORGE B. DEAN
ALAN L. KOVACS
One Ashburton Place—
20th Floor
Boston, Massachusetts 02108

DAVID FROHNMAYER
Attorney General of Oregon
DONALD C. ARNOLD
100 State Office Building
Salem, Oregon 43710

JOHN VAN DE KAMP
Attorney General of California
YEORYIOS C. APALLAS
6000 State Building
350 McAllister
San Francisco, California 94102

ANDREW P. MILLER
GEORGE KAUFMANN
STEPHAN G. WIELGOZ
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

BERNARD NASH
EDWARD G. MODELL
BLUM, NASH & RAILSBACK
1133 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 857-0220

JAMES F. FLUG
PAULA DINERSTEIN
LOBEL, NOVINS & LAMONT
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

December 23, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under § 209 of the Economic Stabilization Act of 1970, as amended, in formulating a remedy for overcharges modeled on previous restitutionary legislation, where the spreading of the consequences of the violation to consumers throughout the economy made it impossible to determine the injuries of individual victims?

2. Do any of the petitioners raise a substantial question that the District Court erroneously denied them any procedural right?

LIST OF JURISDICTIONS JOINING IN THIS BRIEF

We accept the listing of parties below as set forth in the respective petitions; however, we here specifically list the jurisdictions which join in this brief.

Alabama
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Georgia
Guam
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oregon
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota [1]
Tennessee
Texas
Utah
Vermont
Virgin Islands
Virginia
West Virginia
Wisconsin
Wyoming

---

[1] South Dakota joins in the brief as *amicus curiae* pursuant to Rule 36.4 of this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF JURISDICTIONS JOINING IN THIS BRIEF	ii
COUNTERSTATEMENT OF THE CASE	1
A. The Regulatory Program	3
B. The Proceedings Below	5
1. The District Court	5
2. The Court of Appeals	9
REASONS FOR DENYING THE PETITIONS	12
I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT	14
A. Because Section 209 of the ESA Vested the District Court with Broad Equitable Powers, the Scope of "Appellate Review is Correspondingly Narrow"	14
B. The Remedy Chosen by the District Court Was Well-Grounded in Fact and Law	15
1. The Record and Regulatory Scheme Made It Clear That It Was Impossible to Trace the Impact of Exxon's Overcharges to Individual Victims	15
2. The Restitutionary Remedy Selected by the District Court Was Equitable, Fair and Reasonable	18
3. TECA's Decision Is Entirely Consistent With This Court's Decisions	22
II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Adams Resources and Energy, Inc., 9 DOE ¶ 82,553 (1982) 19
Alfred E. Alkek, 9 DOE ¶ 82,521 (1982) 19
Cities Service Co. v. *FEA*, 529 F.2d 1016 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) 5, 7
Citronelle-Mobile Gathering, Inc. v. *Edwards*, 669 F.2d 717 (Em. App.), *cert. denied*, 459 U.S. 877 (1982) 14, 22, 25
Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan.) 16
Federal Power Commission v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) 24
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 27
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 20
Hodgson v. *United Mine Workers*, 153 U.S. App. D.C. 407, 473 F.2d 118 (1972) 29
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 27
Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 15
Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 14, 15, 20
NAACP v. *New York*, 413 U.S. 345 (1973) 29
Pellegrino v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953) 29
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 14, 15, 20, 22-23
Sauder v. *DOE*, 648 F.2d 1341 (Em. App. 1981) 14, 22
Smuck v. *Hobson*, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969) 29
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 22
Tully v. *Mobil Oil Corp.*, 455 U.S. 245 (1982) 12
Tumey v. *Ohio*, 273 U.S. 510 (1927) 18
Union Oil Co. v. *DOE*, 688 F.2d 797 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983) 5, 7
United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 29
United States v. *Leib*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) 22
Wolpe v. *Poretsky*, 70 U.S. App. D.C. 141, 144 F.2d 505, *cert. denied*, 323 U.S. 777 (1944) 29

TABLE OF AUTHORITIES—Continued

UNITED STATES CONSTITUTION Page

Fifth Amendment 25

STATUTES

Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note

§ 209 ..... 1, 2, 5, 7, 9, 11, 14
§ 210 11
§ 211 2

Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 *et seq.* 3, 4

15 U.S.C. § 753(b)(2) 3
15 U.S.C. § 753(b)(2)(A) 4
15 U.S.C. § 754(a)(1) 2

Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (repealed 1946)

§ 205(a) 14, 22
§ 205(e) 22

Energy Conservation and Existing Buildings Act of 1976, Part A, 42 U.S.C. § 6861 *et seq.* 20

Energy Policy and Conservation Act, Part D of Title III, 42 U.S.C. § 6321 *et seq.* 20

§ 6322(a)(1) 21
§ 6322(c) 21
§ 6322(d)(5) 21

Energy Policy and Conservation Act, Part G of Title III, U.S.C. 42 U.S.C. § 6371 *et seq.* 20

Further Continuing Appropriations Act 1983, Pub. L. No. 97-377, 96 Stat. 1830, 1919 § 155 (1982) .. 8, 9, 18-22

Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8621 *et seq.* 21

National Energy Extension Service Act, 42 U.S.C. § 7001 *et seq.* 20

§ 7004(b)(6) 21
§ 7004(b)(7) 21
§ 7005(h) 21

TABLE OF AUTHORITIES—Continued

COURT RULES Page

Rules of the Supreme Court of the United States

Rule 17 12
Rule 36.4 ii

Federal Rules of Civil Procedure

Rule 24 25
Rule 24(a) 28, 29
Rule 24(b) 29
Rule 56 ..... 25, 28

REGULATIONS AND PROPOSED REGULATIONS

Executive Order No. 12287, 46 Fed. Reg. 9909..... 4

Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. § 211 *et seq.* (1984)

§ 211.67 ..... 4, 5, 7, 9, 10
Part 212, Subparts F and L 7
§ 212.83(c) 10
§ 212.83(c)(2)(iii) 7
§ 212.83(d) 10
§ 212.93(a) 10
Energy Measures and Energy Audits, 10 C.F.R. Part 450 (1985) 21

Mandatory Petroleum Products Allocation and Procedural Regulations, 39 Fed. Reg. 1924 (1974) 4

Allocation of Old Oil, 39 Fed. Reg. 31650 (1974), *reprinted in* Energy Mgmt. (CCH), Proposed Regulations 1974-1978, ¶ 12,526 4

LEGISLATIVE MATERIALS

128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982).... 19
128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982).... 18
128 Cong. Rec. S15117 (daily ed. Dec. 16, 1982).... 20
128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982).... 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-429, 85-430, 85-432, 85-440 and 85-444

EXXON CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION [1]

COUNTERSTATEMENT OF THE CASE

This is an action brought by the United States under § 209 of the Economic Stabilization Act of 1970 ("ESA"),

---

[1] This brief is filed on behalf of the States and other jurisdictions listed on p. ii, *supra*. Although we maintain that the courts below correctly resolved all questions of liability (including amount) in favor of the United States and against the Exxon Corporation ("Exxon"), because of the limited scope of the intervention which we were granted below, this brief does not respond to Exxon's petition for certiorari (No. 85-429), which presents no question concerning the distribution of the amounts for which Exxon was held liable.

The opinions below will be cited to the Appendix to the Exxon petition ("Exx. App.").

as amended,[2] against Exxon Corporation, alleging that the prices Exxon charged beginning in January 1975 for crude oil produced from the Hawkins Field Unit ("HFU") in Texas exceeded the maximum prices permitted by law. The District Court found in favor of the United States on the issue of liability. In fashioning an equitable remedy under § 209, the District Court accepted the Government's contention that, "[d]ue to the pervasive reach of oil price regulation at the time these overcharges occurred, . . . the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products*," [3] and ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [4], to be held in trust for immediate redistribution to the States,[5] in proportion to each State's share of nationwide consumption of petroleum products, for expenditures on energy-related programs designed to benefit their injured citizens.[6] TECA, which has exclusive appellate jurisdiction in all ESA and EPAA matters (see ESA § 211), affirmed the District Court's Order.

Four petitions for certiorari, in addition to that of Exxon, have been filed by intervenor-parties at virtually every level of distribution and use of petroleum products,

---

[2] 12 U.S.C. § 1904 note, as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 754(a)(1). In relevant part, § 209 of the ESA provides that a court may "order restitution of moneys received in violation of any . . . order or regulation [under this Title]."

[3] Exx. App. 239a (emphasis added).

[4] Exx. App. 254a.

[5] As used herein, the term "States" refers to all fifty States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands.

[6] Exx. App. 255a-256a.

from refiners to an individual motorist.[7] All challenge the District Court's restitutionary order and contend that awards should instead have been made to them (and to the classes which some purport to represent).

A. The Regulatory Program

The District Court's Order and TECA's affirmance rest squarely on the regulatory program which these decisions implement: we therefore begin by describing that program.

The EPAA, 15 U.S.C. § 751 *et seq.*, directed the President to promulgate regulations implementing price and allocation controls on petroleum and petroleum products, and further directed, in relevant part, that:

> [i]n specifying prices (or prescribing the manner for determining them), the regulation shall provide for (A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level . . . [EPAA, § 4(b)(2), 15 U.S.C. § 753(b)(2)]

"Passthrough" is the key word in this passage and the cornerstone of the implementing regulations. From their

---

[7] The four petitions were filed by: Marathon Petroleum Company, Mobil Oil Corporation, Murphy Oil Corporation, Ashland Oil, Inc., Pennzoil Company, Tenneco Oil Company, and Tosco Corporation (collectively "Marathon") (No. 85-430); Air Transport Association of America, Petroleum Marketers Association of America, The Jobbers' Group, and Independent Gasoline Retailers (collectively "ATA") (No. 85-432); Philadelphia Electric Company ("PECO") (No. 84-440); and National Freight Inc., RJG Cab Co. Inc., and Geraldine H. Sweeney (collectively "National Freight") (No. 85-444). These petitions and their appendices are referred to hereafter, respectively, as, "Mar. Pet." and "Mar. App.", "ATA Pet." and "ATA App.", "PECO Pet." and "PECO App.", and "Nat. Frt. Pet." and "Nat. Frt. App." The 45-volume Record of proceedings in the District Court as filed in the TECA will be referred to by volume number and page number as "— R. —."

adoption on January 14, 1974,[8] until all petroleum products were decontrolled on January 28, 1981,[9] the regulations promulgated pursuant to the EPAA permitted refiners, crude oil resellers and petroleum product resellers to pass through to their customers their net increases in crude oil costs for refined petroleum products, together with their increased costs of purchased refined products and certain "non-product" costs.[10] On August 30, 1974, the Department of Energy's ("DOE") predecessor agency, the Federal Energy Administration ("FEA"), published a Notice of Proposed Rulemaking concerning the Old Oil Allocation ("Entitlements") Program.[11] FEA stated that "[t]he objective of the entitlements program proposed is to achieve the equitable distribution of the low priced old oil among all sectors of the petroleum industry . . . ." (39 *Fed. Reg.* at 31650). FEA also commented that "[u]nder the proposal, all money spent or received as the result of the purchase or sale of entitlements would be passed through to consumers, either as a cost increase or decrease, respectively." (*Id.*).

Effective November 29, 1974, FEA adopted regulations instituting the Entitlements Program.[12] In keeping with the Congressional mandate that there be "dollar-for-dollar passthrough of the net increases in the cost of crude oil," 15 U.S.C. § 753(b)(2)(A), the regulations provided that the entitlements costs or proceeds would be included in crude oil cost calculations. In upholding the constitutionality and validity of the Entitlements Program, TECA explained:

> The basic purpose of the Entitlements Program was to spread the benefit of access to old price-controlled

---

[8] *See* 39 *Fed. Reg.* 1924 (1974).

[9] *See* Exec. Order No. 12287; 46 *Fed. Reg.* 9909 (1981).

[10] *See* 10 C.F.R. § 212.83(c) and (d).

[11] *See* 39 *Fed. Reg.* 31650 (1974).

[12] *See* 10 C.F.R. § 211.67 (1974).

> oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, *all regions of the country, and among all consumers of petroleum products. . . .*[13]

As TECA stated in its opinion herein, one consequence of the Entitlements Program was that if, as happened here, price-controlled crude was improperly certified as exempt (or higher priced) crude oil, the effects of the overcharges initially would be distributed among all domestic refiners; thereupon "the regulatory system was designed to insure that money spent or received by the refiners as the result of their purchases or sales of entitlements would be passed along to the ultimate consumers." [14]

B. The Proceedings Below

1. *The District Court*

On June 8, 1978, DOE instituted this enforcement action against Exxon under § 209 of the ESA, alleging that the prices Exxon had been charging since January 1975 for crude oil produced from the HFU exceeded the maximum prices permitted by law. (I R. 16). In its prayer for relief, DOE urged the District Court to order Exxon to pay the overcharges, with interest, to the United States Treasury.[15] Over the ensuing 4 years, the District Court issued 8 reported opinions and over 100 separate

---

[13] *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) (emphasis added).

[14] Exx. App. 87a, citing *Union Oil Co.* v. *DOE*, 688 F.2d 797, 802 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983). See also the decision of the District Court herein quoted at p. 7, *infra*.

[15] "Plaintiff prays that this Court enter judgment in its favor upon this Complaint: . . . 3. Ordering that Exxon make restitution of moneys, in the form of payments to the United States Treasury, equal to the amount of its overpricing for first sales of crude oil from the [Hawkins Field Unit];" (I R. 33).

orders, and TECA issued 3 reported opinions on interlocutory appeals brought by Exxon.

On August 27, 1982, DOE and Exxon filed cross-motions for summary judgment presenting both liability and remedy issues for decision. On November 24, 1982, five weeks *after* oral argument on the summary judgment, a group of 6 refiners, including 4 of the 7 petitioners in No. 85-430, and a trade association representing other refiners ("Indicated Refiners") filed a "Conditional Motion . . . To Intervene" in which they argued, as Exxon had, that "it is impossible to trace the impact of the overcharges," and that, based upon precedent in private antitrust damage actions, refiners should receive the entire overcharge fund (XLV R. 38973). Some three months *after* oral argument, 5 gasoline station operators ("Gasoline Retailers"), purporting to represent 187,000 independent branded retailers throughout the United States, filed a motion for limited intervention in the District Court; they urged that the "impact of the overcharge" should be traced through the DOE Entitlements Program to the "more than 200 refiners nationwide" and then, "taking into account each refiner's banked costs" and DOE's "[c]omprehensive compliance audits", to all "purchasers of refined products throughout the period of violation" (XLV R. 38995-38997). At Exxon's request, the District Court stayed consideration of both the Indicated Refiners' and the Gasoline Retailers' intervention motions. (ATA App. A-288 and A-289.)

On March 25, 1983, the District Court issued its Memorandum Opinion holding Exxon liable for some $895 million in crude oil overcharges between January 1975 and January 1981, plus interest. The District Court determined that, as a matter of law, Exxon was required to change its accounting practices relating to Hawkins Field crude oil on January 1, 1975, and that there was no factual dispute as to its failure to do so

In fashioning an equitable remedy under § 209 of the ESA, the District Court determined that "the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products.*" [16] Following TECA's prior holding concerning the operation of the Entitlements Program, the District Court reasoned that "[j]ust as the program spread the benefit of access to old oil, so too did the program spread the burden of Exxon's overcharges among all sectors of the petroleum industry, all regions, and all consumers [of petroleum products]." [17] The District Court also referred to record evidence of Exxon's admitted understanding of this impact [18] as well as the cost-passthrough effects of DOE's price regulations.[19] It determined:

> Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[20]

Accordingly, the District Court found that:

> [t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each.[21]

---

[16] Exx. App. 239a (emphasis added).

[17] Exx. App. at 248a, citing *Cities Service Co.* v. *FEA*, p. 5 n.13, *supra*. *See also id.* at 248a-249a, quoting *Union Oil Co.* v. *DOE*, *supra*, p. 5, n.14.

[18] Exx. App. 248a-249a.

[19] Exx. App. 249a, citing 10 C.F.R. § 212.83(c)(2)(iii) and 10 C.F.R., Part 212, Subparts F and L.

[20] Exx. App. 249a. Based on this finding, the District Court initially denied the conditional intervention motion of the Indicated Refiners and the motion for limited intervention of the Gasoline Retailers. Exx. App. 249a, n.56.

[21] Exx. App. 250a.

The District Court ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [22] to be held "in trust" [23] for distribution to the States, in proportion to each State's share of nationwide consumption of petroleum products, for use in energy-related programs designed to benefit their injured citizens.[24] The procedures for disbursement to the States were modeled on the Congressional enactment of § 155 of the Further Continuing Appropriations Act, 1983.[25] The District Court explained:

> *In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.* However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs.

---

[22] Exx. App. 254a.

[23] District Court Judgment, XXXV R. 31658 at 31659.

[24] Exx. App. 255a-256a. The programs are listed *infra* at p. 20, n.41.

[25] Pub. L. No. 97-377, 96 Stat. 1830, 1919, § 155 (1982) ("Warner Amendment" or the "Amendment"), reproduced at ATA App. A-316. In the Warner Amendment, Congress directed the Secretary of Energy to distribute up to $200 million in escrowed overcharge funds for energy related uses by the States in proportion to the relative consumption of both price-controlled and uncontrolled petroleum products in each State during the period in which price controls were in effect.

> The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. *Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.* [Exx. App. 256a, footnote omitted, emphasis added.]

Thereafter 33 States and Territories and the District of Columbia were allowed to intervene to support the District Court's restitution order on appeal.[26] Six additional separate motions to intervene were filed by a joint total of 14 parties, including refiners, jobbers, utilities, a trucking company, a taxicab company, and an individual motorist. Each of these motions sought only to intervene for purposes of appeal. None moved the District Court to reopen the record on the question of the feasibility of tracing the effect of the overcharges or for a hearing on or reconsideration of any issue. The District Court granted all applications for intervention, including on reconsideration those of the Indicated Refiners and the Gasoline Retailers, for the purpose of arguing the remedy issue on appeal. (*See* ATA App. A-290 through A-298).

2. *The Court of Appeals*

On appeal, TECA unanimously affirmed the judgment of liability against Exxon. By a 2-1 vote, TECA also affirmed the District Court's remedy under § 209.

TECA rejected the contention "that the trial court was required to trace, or attempt to trace, the overcharges from first purchaser, to refiner, through various monthly accountings required by the Entitlements Program and its 'banking' system, and then to determine the nature

---

[26] Subsequently, 12 additional States intervened for the same purpose before TECA.

and extent of any passthrough of increased costs through the distribution system, such as might be authorized by 10 C.F.R. Section 212.83(c)-(d) (refiners) and 212.93(a) (resellers and retailers)." (Exx. App. 85a). TECA agreed with the District Court that:

> any attempt to trace the overcharges would be doomed to failure because of the pervasive influence of the Entitlements Program and other regulations which had the effect of passing on and diffusing the HFU overcharges through the distribution system. [Exx. App. 86a-87a.]

TECA explained the consequences of the Entitlements Program whereby overcharges would be passed along to the ultimate consumers (Exx. App. 87a; *see* pp. 3 to 5, *supra*) and continued:

> We agree with the trial court's conclusion that any attempt to trace increased costs attributable to the HFU overcharges would require a full scale audit of the entire petroleum industry, and that any effort to do so would be futile. As the Government suggests, the first step in any such audit would require recalculating over seventy monthly entitlement lists issued during the period of the overcharges, taking into account such variables as the volumes of new and old oil produced during each month, the average acquisition costs, and the values of each entitlement. In determining the precise impact of the overcharges on any particular refiner, it would then be necessary to consider the impact of exception relief which may have been granted by the agency over the term of the Entitlements Program.
>
> * * *
>
> Even if the HFU overcharges could be traced to individual refiners, it would then be necessary to trace their effect on product resellers, retailers and consumers, through the provisions of passthrough regulations. That this task would be futile is illustrated by the difficulty of applying only one aspect of the regulations, that is, the calculation of "banked

> costs." Exxon itself admitted that it was unable to supply information on its own costs. . . .
>
> * * *
>
> The fact that banked costs might exist as to any particular refiner does not mean of course that increased costs were not passed on through the distribution system. To determine this would require an investigation into the state of mind of each refiner in setting prices for individual petroleum products each month. Such a task would be impossible, and several of the intervenors have so conceded. [Exx. App. 88a-90a.]

TECA rejected the refiners' suggestion "that refunds be made payable to themselves as 'first purchasers' [because] that would result in inequities, inconsistent with the fundamental purpose of restitution under Section 209." (Exx. App. 90a). Moreover, TECA ruled:

> There was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products. In this respect, it should be noted that this action for restitution under Section 209 differs in significant degree from a private action of damages under Section 210 [Exx. App. 90a-91a.]

In conclusion, TECA approved the "form of relief chosen by the trial court in this action by which the restitution funds will be channeled through the states for use in the enumerated energy programs designed to benefit the consuming public . . . ." (Exx. App. 91a):

> We believe this form of disbursement to be equitable, and fair, and a reasonable method of compensating the consuming public for the HFU overcharges. It accomplishes the intent of Congress that violators of the price regulations be required to disgorge their gains, even in situations where it may not be possi-

> ble to identify and compensate each individual victim. While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest. [Exx. App. 91a-92a, footnote omitted.]

Petitions for rehearing and/or suggestions for rehearing *en banc* filed by Exxon and several intervenor appellants were denied. (Exx. App. 269a-270a). On October 23, 1985, TECA denied a motion by Marathon, Mobil and Murphy for leave to file a second petition for rehearing.

REASONS FOR DENYING THE PETITIONS

The several petitions filed herein uniformly fail to demonstrate that there are, as Rule 17 requires, "special and important reasons" for this Court to grant another round of review of the District Court's exercise of its equitable discretion in formulating a restitutionary remedy for this case. The remedy chosen rests on the District Court's reasoned conclusion—based upon the regulatory scheme and the voluminous record before it—that the consequences of Exxon's overcharges were spread throughout the economy so that individual victims and amounts of injury cannot possibly be identified and that, ultimately, all oil products consumers nationwide suffered as a result of the overcharges. Accordingly, the District Court fashioned a well-grounded remedy to benefit those ultimate consumers.

In turn, TECA, "a court intimately familiar with the intricacies of federal energy regulations," (*Tully* v. *Mobil Oil Co.*, 455 U.S. 245, 248 (1982)), and empowered with exclusive appellate jurisdiction in these matters, agreed with the District Court's findings, and approved its choice

of remedy as "equitable, and fair, and a reasonable method of compensating the consuming public for the . . . overcharges". (Exx. App. 91a). In so ruling, TECA observed that "other remedies might have been adopted by the trial court" (Exx. App. 92a), and thus refrained from limiting future decisions in similar cases. Thus, far from deciding any "important question of federal law which has not been, but should be settled by this Court", it merely applied its long experience with and expertise in the regulatory mechanism it supervises to confirm that the District Court's restitutionary choice not only fell within the broad equitable discretion which prior opinions of this Court and TECA had already settled, but was a commendable exercise of that discretion in the complex context of the particular regulatory violation at issue, where identification of individual injury among many millions of potential claimants was impossible. Petitioners' attempt to narrow this discretion, and to have this Court require the trial court in every case to attempt identification of individual injury even where that task is impossible, lacks both logic and precedent.

Finally, the petitioners' various contentions that they were improperly denied procedural rights are wholly without merit. The only petitioners who sought intervention in the District Court prior to the entry of judgment did so well after final oral argument on the summary judgment motions, and their intervention papers merely added reasons for a finding of impossibility, as described above. All other petitioners requested—and were granted—intervention only for purposes of appeal. Thus, there has been no departure "from the accepted and usual course of judicial proceedings" requiring further review by this Court.

I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT

A. Because Section 209 Of The ESA Vested The District Court With Broad Equitable Powers, The Scope Of "Appellate Review Is Correspondingly Narrow"

Section 209 of the ESA, under which the United States brought this suit against Exxon, provides that, in addition to the power to issue mandatory injunctions granted therein, "the court may also order restitution of moneys received in violation of any . . . order or regulation [under this Title]." The District Court was thus vested with broad discretionary power.[27] As Justice Harlan wrote in *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.

Justice Harlan also quoted with approval and followed this Court's decision on the scope of equitable jurisdiction under § 205(a) of the Emergency Price Control Act of 1942, *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946):

> Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a pro-

---

[27] Exx. App. 86a; *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 721-722 (Em. App.), *cert. denied*, 459 U.S. 877 (1982); *Sauder* v. *DOE*, 648 F.2d 1341, 1348 (Em. App. 1981).

> ceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . .
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503. [361 U.S. at 292, quoting 328 U.S. 397-398].

These decisions give special force herein to a corollary of the trial court's "broad discretionary power" in shaping equity decrees—that "appellate review is correspondingly narrow." *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973) (Op. of Burger, C.J.). *A fortiori*, where as here, the Court of Appeals has approved as "equitable, and fair, and . . . reasonable" the District Court's exercise of its equitable jurisdiction, only a most compelling showing of abuse could justify a second round of review by this Court. No such showing has been made by any of the petitioners herein.[28]

B. The Remedy Chosen By The District Court Was Well-Grounded In Fact And Law

1. The Record And Regulatory Scheme Made It Clear That It Was Impossible To Trace The Impact Of Exxon's Overcharges To Individual Victims

The District Court found, on the basis of the record before it: "The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of

---

[28] Petitioners are not identically situated substantively or procedurally. Where pertinent in this discussion, we will identify particular petitions or petitioners. Otherwise, the term "petitioners" will mean some or all of those identified in n.7, *supra*.

the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." (Ex. App. 250a).[29] (See p. 7 *supra*). TECA "agree[d] with the trial court that any attempt to trace increased costs attributable to the HFU overcharges would require a full-scale audit of the entire petroleum industry, and that any effort to do so would be futile." (Exx. App. 88a). It explained that conclusion by detailed examination of the regulatory scheme, about which it has developed special expertise in the exercise of its exclusive appellate jurisdiction.

Petitioners point to no evidence which was in the record before the District Court which contradicts, let alone renders unreasonable, the District Court's and TECA's conclusion that the ultimate victims of Exxon's overcharges and the extent of their individual injuries cannot be ascertained in any manageable proceeding. Nor did any of the petitioners offer to present such evidence to the trial court in motions to intervene or otherwise. Here, however, they rely on a 1985 report by DOE's Office of Hearing and Appeals (the "OHA report") in a separate, ongoing proceeding.[30] That report, obviously,

---

[29] The tracing issue was vigorously litigated before the District Court entered judgment. As that court observed, in order "to postpone its day of reckoning" Exxon had argued:

> that it must be allowed to conduct further discovery to determine if the Entitlements Program in fact operated as it was designed and to trace the Hawkins Field overcharges to their ultimate victims. In effect, Exxon would like to launch a nationwide inquiry into the workings of more than 200 domestic refiners during a period of several years. [Exx. App. at 247a-248a.]

[30] Report of the OHA to the United States District Court for the District of Kansas in *Department of Energy Stripper Well Exemption Litigation* (*"Stripper Well Litigation"*), M.D.L. No. 378, reproduced in ATA App. at A-320. Although OHA's factfinding in the *Stripper Well Litigation* should have no bearing upon the correctness of the District Court's earlier findings in this case, based upon the record at the time judgment was entered, the States note

was not before the District Court when it rendered its decision or thereafter. In fact, the OHA report was issued on June 21, 1985, more than a year after oral argument of this case before TECA and less than two weeks before TECA issued its opinion affirming the District Court.[31] The District Court's finding cannot be overturned on the basis of a report which was not before it.[32] Nor can it be overturned on the basis of a criticism of that report,

---

that, like the District Court here, the recent report found, after nearly two years of effort, that:

> it is impossible to trace these increased costs [of crude oil to all domestic refiners] through an individual refiner's refining, distribution and marketing operations. In fact, no party sought to establish such a tracing in the context of this proceeding, or suggested a valid tracing methodology based on inspection of an individual refiner. [ATA App. A-339.]

[31] ATA's assertion that the "very facts" which it alleges concerning the possibility of tracing "appear *in the instant record* in the form of a detailed fact finding report by the OHA" (ATA Pet. 14) is, therefore, incorrect. Indeed, when the OHA report was submitted to TECA that court was careful to provide only "that the Report of OHA of June 21, 1985 be filed in the Office of the Clerk of this Court." Order Denying Without Prejudice Motion To Permit Parties To File A Supplemental Brief On The Significance Of The June 21, 1985 OHA Report And Granting Leave To File The Report. (ATA App. at A-189.)

[32] Indeed, the Kansas district court has not yet decided whether to adopt the OHA report. Moreover, in relying on that report for the proposition that it would be feasible to trace the injuries of the victims of the overcharges, petitioners fail to take due account of the two serious deficiencies which that report itself acknowledges:

First, the report rests on assumptions and estimates which it admits are subject to valid criticism. It is, in its own terms, only one theoretical estimate of the impact on the refining industry as a whole if a particular set of contested assumptions is applied.

Second, as the report states, *no methodology exists by which to determine the impact on any particular refiner, much less downstream customers of any refiner or direct purchaser. See* n.30, *supra*; ATA App. at A-346, A-380 to A-381.

as three refiners remarkably argue in a supplemental brief.[33]

2. *The Restitutionary Remedy Selected By The District Court Was Equitable, Fair and Reasonable*

The District Court's decision to look to the Warner Amendment (also referred to as "§ 155") as the model for its choice of restitutionary distribution to benefit consumers was a sound exercise of its discretion since "the victims of the petroleum overcharges cannot be identified." (Exx. App. 256).[34] Three points about the Amendment are especially noteworthy. First, Congress stated that where particular injured individuals "cannot be *reasonably* identified," or their injury "is too small to be capable of *reasonable* determination," a refund for energy related purposes through the States is one which is "*reasonably* expected to benefit the class of persons injured." § 155(a) (emphasis added).[35] Second, in choosing a State-

---

[33] *See* Supplemental Brief of Petitioners Marathon, Mobil, and Murphy in Support of Petitioners (No. 85-430). The materials which that brief presents concerning a controversy over various drafts of the OHA report are, of course, entirely outside the record which was before the District Court and before TECA when it affirmed. It is a measure of these petitioners' desperation that they must rely on such materials, and on the contention that OHA's supposed bias creates a due process issue under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), in order to seek review of a judgment which did not in any way depend on the OHA report.

[34] Because of the change of circumstances resulting from decontrol in 1981, previous mechanisms for passing refunds along the distribution chain to ultimate consumers no longer exist. Thus, as TECA stated, refunds to first purchasers would "result in inequities, inconsistent with the fundamental purpose of restitution under § 209." (Exx. App. 90a).

[35] *See, e.g.*, 128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982) (statement of Senator Percy):

> This money would come from $200 million now in escrow which has been collected from oil company overcharges to consumers during the seventies. This money rightfully belongs to the con-

based remedy, Congress necessarily found that paying such funds to the States, in proportion to their oil product consumption and on behalf of their injured citizens for energy related purposes, is "restitutional." *Id.* Third, in adopting the Amendment, Congress confirmed the propriety of DOE's repeated use of the State remedy to benefit ultimate consumers,[36] and accelerated what DOE had been intending to do with escrowed overcharge funds even without Congressional action, *i.e.*, distribute funds to States on behalf of ultimate consumers.[37]

The petitioners' primary disagreement with the District Court's remedy is, of course, that they would prefer to receive the money themselves. While they do raise objections directed specifically to the use of the Warner Amendment, these do not have any merit.

a. Petitioners argue that the District Court should not have turned to the Warner Amendment as a model be-

---

sumers who were actually overcharged during this period. But because it is impossible to identify each individual consumer, we should at least attempt to place this money where consumers in general will benefit. Distribution to the States provides the quickest means to get this money out.

[36] *See e.g., Alfred B. Alkek*, 9 DOE ¶ 82,521, at p. 85,134 (1982) ("We chose to distribute the money to state governments because we believed that they would be able to design a distribution scheme for the refund proceeds which would benefit all injured consumers in each state, and account for the varying energy-related needs of their citizens. We also believe that the states would be able to expend the proceeds in an administratively efficient and cost-effective manner."); *Adams Resources and Energy, Inc.*, 9 DOE ¶ 82,553 at p. 85,292 (1982).

[37] In proposing the Amendment, Senator Warner stated: "The Department of Energy is seeking to provide secondary remedies to State governments and is currently reviewing a distribution plan which I understand is consistent with this amendment." 128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982). *See also* 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (statement of Senator Kennedy): "DOE has in part been proceeding in this fashion. It is the most appropriate method of providing restitution for the injuries suffered by the consumer."

cause the Amendment provided only for a one-time distribution of funds. The argument overlooks the court's clear statement that it was "in no way rel[ying] on Section 155 as an express statutory grant of authority to this court but [was acting] instead in the exercise of its broad equitable power to order restitution." (Exx. App. 256a, quoted at p. 8, *supra*).[38] Congress' decision not to *compel* future distribution on the basis of the Warner Amendment formula[39] cannot be taken as precluding a court of equity from choosing to do what Congress had done and for similar reasons.[40] "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *DeMario Jewelry*, 361 U.S. at 291, *quoting Porter*, 328 U.S. at 398; *see also Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944).

b. Some petitioners present undocumented assertions that they will not receive any benefit at all from the programs which the States must fund under the District Court's order.[41] While there is no requirement that the

---

[38] This fact renders frivolous the assertion of the National Freight petitioners that by selecting the approach of the Warner Amendment, the District Court violated the constitutional separation of powers. (Nat. Frt. Pet. 13-14, 21-22).

[39] The Senate-passed version made the Warner mechanism *mandatory* in all future cases. *See* 128 Cong. Rec. S15117 (daily ed., Dec. 16, 1982).

[40] Petitioners rely especially on the comments of Congressman Dingell as forbidding any use of the Warner Amendment as precedent; but, where, as shown above, the statute on its face makes clear Congress' view that its own remedy was reasonable and restitutionary, a court may accept the soundness of that judgment.

[41] The five Federal energy conservation programs involve (1) weatherization of buildings (*see* 42 U.S.C. § 6861 *et seq.*); (2) implementation of State energy conservation programs (*see* 42 U.S.C. § 6321 *et seq.*); (3) reduction of energy consumption in, or the funding of alternate energy sources for, schools and hospitals (see 42 U.S.C. § 6371 *et seq.*); (4) promotion of conservation by small businesses and individuals, (*see* 42 U.S.C. § 7001 *et seq.*); and (5)

remedy adopted by the court directly benefit each person who was injured by the overcharges, it is plain that petitioners' view of these programs is far too narrow. For example, State energy conservation plans are intended to reduce total energy consumption by all citizens and businesses within the State. *See* 42 U.S.C. § 6322(a)(1).[42] A reduction in demand can lower oil product prices, benefitting all buyers, especially commercial users, in proportion to consumption, and in long-range terms will reduce the dangers of harmful energy shortages. Moreover, the provisions which are listed in the District Court's order are sufficiently broad and flexible to permit funding of programs which would quite specifically benefit businesses such as those represented by various petitioners. Without attempting to be exhaustive, we note in the margin some possibilities which readily come to mind.[43]

---

assistance to low-income people in paying home utility bills (*see* 42 U.S.C. § 8621, *et seq.*). *See* Exx. App. 255a, n.58.

[42] To achieve that goal, the plans are *required* to promote more efficient lighting for public buildings and thermal efficiency standards and insulation requirements for new and renovated buildings. 42 U.S.C. § 6322(c). The States are further permitted to adopt transportation controls, programs of public education, and "any other appropriate method or programs to conserve and to improve efficiency in the use of energy." 42 U.S.C. § 6322(d)(5).

[43] State energy conservation plans are intended to be coordinated with the operation of State energy extension service plans, 42 U.S.C. § 7005(h), which in turn allow the States to provide on-site energy use evaluations and recommendations to consumers and businesses, including information about the availability of aid for "planning, financing, installation, and effective monitoring of energy-related facilities and activities." 42 U.S.C. § 7004(b)(6) and (b)(7). Airports and airlines could seek aid for airport improvements to reduce fuel burning caused by delays in landing time under these provisions. Part 450 of 10 C.F.R. contains a list of energy conservation measures already approved by DOE for implementation by State energy extension services with both residential and industrial applications, including, for example, audits, insulation measures, control systems and installation of high efficiency

In short, it was fully appropriate for the District Court to look "at the policy of the legislation and fashion[] a remedy that will effectuate that policy," *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957), and in doing so, (as the District Court said) to "respect[] the wisdom of the solution chosen by Congress and [to] adopt it as the most appropriate equitable remedy in the circumstances of this case." (Exx. App. at 256a).

3. *TECA's Decision is Entirely Consistent With This Court's Decisions*

TECA in this case and in its prior decisions has fully attended to this Court's major teaching in *Porter* v. *Warner Holding Co., supra*, that in these public enforcement cases, courts should exercise broad and flexible powers to do equity.[44] Nevertheless, citing private damage action precedents, and ignoring *Porter's* distinction between such private actions and public restitution actions,[45] petitioners argue that *Porter* restricted the scope of equitable jurisdiction, and required individual injury determinations in every overcharge restitution case. They do so by tearing out of context the concluding paragraph of the *Porter* opinion, from which they quote.[46] That paragraph

---

equipment. These are precisely the type of efforts in which many utilities already engage and which the States could help finance under the remedy adopted by the District Court.

[44] *See Citronelle-Mobile* and *Sauder*, p. 14, n.27, *supra*.

[45] "Restitution, which lies within that equitable jurisdiction [granted by § 205(a) of the 1942 price control Act] is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e)." 328 U.S. at 402.

[46] Marathon's argument that by "restitution, Congress meant the refund of overcharges to the party injured" as in *United States* v. *Lieb*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) (Mar. Pet. 15), is wholly without merit. Where Congress takes pain to confirm an expressly "inherent equitable power" of historically large scope, its action is not to be construed as nar-

set forth the trial court's authority and responsibility on remand to resolve "conflicting claims and counterclaims between tenants and landlord as to the amounts due . . ." (328 U.S. at 403). The "interested parties" whom the trial court was instructed to bring in, if necessary, were the tenants against whom the landlord had such counterclaims, a small and readily ascertainable class.[47] The purpose of bringing them in was not to allow them to assert claims for restitution (which the Secretary was doing on their behalf) but to enable the court to adjudicate any "counterclaims" against them by the landlord.

Because "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each," [48] the teachings of *Porter* which are truly applicable in this case are those which forcefully affirm the broad powers of the courts of equity to fashion a restitutionary remedy, *see* pp. 14 to 15, *supra*. Petitioners' insistence that proceedings were required which would enable them, and the literally countless other persons and entities who were similarly

---

rowing the courts' discretion by requiring them to conform to the particular circumstance of a case which is cited in the legislative history to illustrate that the power already exists.

[47] This portion of the *Porter* opinion was a response to the landlord's argument, based on evidence that he "may have valid counterclaims against certain tenants for damage to or theft of its property." (Br. for Warner Holding Co., No. 793, Oct. T. 1945, p. 36, quoting 60 F. Supp. 513, 520.) This Court's opinion answered the trial court's question: "Could this court, without a jury, adjudicate the amount of restitution in each of the twenty rental units involved here, some of which have had several different tenants, without the tenants before it and without the defendant having an opportunity to interpose valid counterclaims as a defense?" (*Id.*) This Court held that a court of equity did have the power to adjudicate the counterclaims and to bring the tenants before it for that purpose.

[48] Exx. App. at 250a.

situated, to prove their individual injuries in order that they may be compensated, cannot be reconciled with those teachings. Indeed, as the District Court recognized, adoption of the petitioners' position would, as a practical matter, nullify the restitutionary remedy "because DOE [or a court] could never accurately determine the losses suffered by any one claimant." (Exx. App. at 253a.)

The decision below is also entirely consistent with *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). While *Interstate* directed the federal court to make a "prognostication" as to what would in fact have happened as a consequence of federal or State law if the stay had not been issued (*id.* at 584), it was evidently anticipated that this task could readily be accomplished:

> Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process. [*Id.*]

Here, by contrast, the courts below have found that allocating the fund among the potential individual claimants is "impossible." (Exx. App. 86a-91a, 247a-151a).[49]

Surprisingly, since this Court does not sit to resolve intracircuit conflicts, petitioners attempt to make much of a supposed inconsistency between the decision below

---

[49] Some petitioners place particular reliance on a portion of Justice Frankfurter's separate concurring opinion. In so doing, they omit the concluding sentence of the paragraph from which they quote: "It will be time enough to distribute the fund by some makeshift rule of thumb if what is concededly a rule of intrinsic fairness should be found judicially unenforceable." (336 U.S. at 590). Justice Frankfurter recognized that even a "makeshift rule of thumb" would be preferable to imposing upon the lower court a duty which it could not perform; here, no "makeshift" rule was needed since there existed a model well grounded in Congressional and administrative example.

and that in *Citronelle-Mobile Gathering, supra.* In so doing, petitioners simply disregard TECA's careful and detailed explanation (Exx. App. 85a-87a) of why "the District Court's judgment and Order . . . are fully in accord with our ruling in *Citronelle* . . . ." (*Id.* 85a).

II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW

Petitioners present an array of procedural objections to the District Court's decision, invoking variously Rules 24 (intervention) and 56 (summary judgment) of the Federal Rules of Civil Procedure and the Due Process Clause of the Fifth Amendment. Their common objection, whatever the form of their individual arguments, is that the District Court should have granted them a hearing on the issue of remedy. A close examination of the proceedings below and of the respective petitions shows that none of the petitioners present a procedural issue meriting review.

A. At the outset, it is essential to recall that most of the parties that are now petitioners here sought leave from the court to intervene *only for the purposes of appeal.* This was true of all the parties who moved to intervene after the court issued its decision—specifically three of the refiners who petition in No. 85-430 (Marathon, Mobil and Murphy); all parties to the ATA petition (No. 84-432) except the Gasoline Retailers (specifically ATA, Petroleum Marketers and Jobbers); as well as PECO (No. 85-440); and all parties to the National Freight petition (No. 85-444) (National Freight, RJG Cab and Sweeney). These parties did not move the District Court for leave to adduce any evidence to refute any of the findings which the court had made or otherwise to reconsider its decision. In short, since the District Court granted the postjudgment movants all the intervention which they sought, they cannot now assert that the court denied them any procedural rights.

B. This leaves to be considered only the procedural objections of the prejudgment (but post-oral argument) movants, the Indicated Refiners and the Gasoline Retailers.

1. Four of the refiners who were parties to the Indicated Refiners' prejudgment motion to intervene have joined in the Marathon petition;[50] that petition raises two related procedural issues. (Mar. Pet. i).

The first is that the District Court should have given notice and an opportunity to be heard to all potential claimants. That issue is insubstantial. The court could not possibly provide notice or an opportunity to be heard to all such persons, which include not only the present intervenors, but all others similarly situated, including, for example, 187,000 gasoline retailers and tens of millions of individual motorists. The refiners have asserted that *they* were injured and were unable to pass through all of the overcharges, but not that other persons such as consumers bore none of the burden. Moreover, as the refiners recognize, TECA ruled that such notice was unnecessary "on the theory that actual overcharges are incapable of judicial proof." (Mar. Pet. 20). They now contend—and this is the second part of the question which they present—that "that 'finding' is pure speculation." (*Id.*).

As shown above, however, the District Court's finding was fully substantiated in the Court's analysis of the regulatory framework and the particular record before it, the issue having been pressed by Exxon. Even more important for present purposes, the refiners cannot ask this Court to review that finding because, far from proffering any contrary evidence, they conceded the impossibility of tracing the overcharges below. In the District Court the Indicated Refiners asserted that "it is impossible to trace the impact of the overcharges directly to

---

[50] They are Ashland, Pennzoil, Tenneco and Tosco.

any subsequent purchasers." (XLV R. 38973). Before TECA, the other refiners who here join in the Marathon petition asserted that with respect to both controlled and uncontrolled petroleum products that it would be impossible to determine whether or not the refiners absorbed or passed on the overcharges.[51]

The refiners so argued because their position in the courts below was that the rule in antitrust damage suits under *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) should be applied by analogy. They argued that in providing a remedy under § 209, the District Court was bound to award restitution to the first purchaser without regard to actual injury, as TECA had done in certain circumstances in private § 210 damage suits. TECA rejected that restrictive view of § 209 (Exx. App. 90a) and the question presented in the Marathon petition does not challenge this basis for denying the refiners' claim. That is, of course, a separate and independent ground for denying the refiners' petition.[52]

2. The Gasoline Retailers present no question or argument relating to the fact that their motion to intervene

---

[51] Brief of Intervenor-Appellants Marathon Petroleum Company, *et al.*, at 16-17. This statement by Marathon, *et al.* and that of another refiner which is not a petitioner here were cited by TECA in making the very ruling which the refiners now challenge. *See* Exx. App. 90a, quoted at p. 11, *supra*.

[52] In the closing footnote of their petition, the refiners say that, if the lower courts had applied the principles of the above-cited decisions, "*the impossibility of proving the absorption or pass on of overcharges in transactions subsequent to the first purchases* would have required the entire restitutionary award to be made to the first purchaser unless a showing was made that a subsequent purchaser had a fixed quantity cost plus contract or its functional equivalent." (Mar. Pet. 24, n.21, emphasis added). The underscored passage is consistent with the refiners' position below, but cannot be reconciled with the theory of their petition—that they are entitled to a hearing on whether it is "impossible".

was filed prior to the District Court's judgment.[53] Rather, their petition makes a more general point, applicable to all the parties which join therein, that, because the District Court had granted them intervention as a matter or right under Rule 24(a), it violated that Rule by denying them the opportunity to present evidence of their injury. ATA Pet. i, first question; 18-21.[54] This contention is a *non sequitur*, for Rule 24(a) contains within it the requirement that the motion to intervene as of right be "timely".

Here, all the motions which sought intervention for the *purpose of appeal* were timely for that purpose and were granted. On the other hand, neither the motion of the Gasoline Retailers nor that of the Indicated Refiners, which were filed prior to judgment but after oral argument on DOE and Exxon's motions for summary judgment, were timely for the purpose of requiring the District Court to reopen its proceedings. The indisputable fact is that from the very outset of this case it has been clear that the United States was seeking restitution in the form of a payment into the United States Treasury. (*See* Complaint quoted at p. 5, n. 15, *supra*). The movants did not suggest in the District Court—nor do they

---

[53] The Retailers' motion to intervene was originally denied by the District Court on the basis of its finding that the real victims of the overcharges were the ultimate *consumers* of petroleum products. (Exx. App. 249a, n.56). It is significant that the petition for certiorari in which they joined contains nothing to show that any retailer can demonstrate injury as a result of Exxon's overcharges.

[54] The parties to the ATA petition other than the Gasoline Retailers cannot maintain that contention for the additional reason that they moved to intervene only for the purposes of appeal. They are thus making the unsupportable assertion that the District Court erred by denying them that for which they did not ask. Likewise, since *none* of the petitioners opposed the granting of summary judgment, in accordance with the procedures of Rule 56 or otherwise, the argument in the ATA petition, pp. 21-23, that their rights under Rule 56 were infringed is also untenable.

demonstrate now—that they had a right to wait until the proceedings before the District Court were virtually complete before seeking to make a record on their claims.

The position urged in the ATA petition would lead to the absurd result that, where intervention is as of right, intervention may not be granted for purposes of appeal only. This Court has, however, approved intervention for purposes of appeal only, stressing that the propriety of such an appeal depends on "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977). *Cf. NAACP* v. *New York*, 413 U.S. 345, 366 (1973). In *McDonald*, intervention had been allowed under Rule 24(b), *see id.* at 390, but the Court there cited with approval a series of court of appeals decisions which allowed intervention for purposes of appeal only under Rule 24(a). (*Id.* at 395-396, n.16).[55]

No distinction between Rules 24(a) and (b) for this purpose has been proffered in the ATA petition, or readily suggests itself. If petitioners' submission were correct, a party whose interest is sufficient to allow intervention as of right and is timely for purpose of appeal could not be granted such intervention without being allowed to reopen the case in the trial court, even if its intervention is untimely for that purpose. Any such result would either defeat the right to intervene for purposes of appeal only or undermine the timeliness requirement of Rule 24(a).

---

[55] These cases are: *Hodgson* v. *United Mine Workers*, 153 U.S. App. D.C. 407, 419, 473 F.2d 118, 129 (1972); *Smuck* v. *Hobson*, 132 U.S. App. D.C. 372, 378-379, 408 F.2d 175, 181-182 (1969); *Pellegrino* v. *Nesbit*, 203 F.2d 463, 465-466 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 70 U.S. App. D.C. 141, 144, 144 F.2d 505, 508, *cert. denied*, 323 U.S. 777 (1944). The reports of the other cited cases do not state whether Rule 24(a) or (b) intervention was involved.

In sum, the prejudgment movants' procedural objections are no more worthy of review than those of the other petitioners, who intervened for purposes of appeal only.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
of Massachusetts
GEORGE B. DEAN
ALAN L. KOVACS
One Ashburton Place—
20th Floor
Boston, Massachusetts 02108

DAVID FROHNMAYER
Attorney General of Oregon
DONALD C. ARNOLD
100 State Office Building
Salem, Oregon 43710

JOHN VAN DE KAMP
Attorney General of California
YEORYIOS C. APALLAS
6000 State Building
350 McAllister
San Francisco, California 94102

ANDREW P. MILLER
GEORGE KAUFMANN
STEPHAN G. WIELGOZ
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

BERNARD NASH
EDWARD G. MODELL
BLUM, NASH & RAILSBACK
1130 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 857-0220

JAMES F. FLUG
PAULA DINERSTEIN
LOBEL, NOVINS & LAMONT
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

December 23, 1985

(5) (4) (4) (3) (3)

Nos. 85-429, 85-430, 85-432, 85-440, and 85-444

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL., PETITIONERS

v.

EXXON CORPORATION AND UNITED STATES OF AMERICA

PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS C. NEWKIRK
Chief Counsel
Economic Regulatory Administration
Department of Energy
Washington, D.C. 20585

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether crude oil price control regulations in effect between 1973 and 1981 required petitioner Exxon Corporation to calculate the amount of "new oil" at its Hawkins Field Unit by reference to the additional oil actually produced in the unit as a whole rather than by reference to production that Exxon shifted from one lease to another within the unit (No. 85-429).

2. Whether the regulations impermissibly discriminated between units formed at different times (No. 85-429).

3. Whether Exxon's suggested effective date for calculating new oil on a unit-wide basis was unreasonable as a matter of law (No. 85-429).

4. Whether Exxon was properly held liable for all of the crude oil overcharges that it caused (No. 85-429).

5. Whether the district court abused its discretion in ordering the restitution of crude oil overcharges through the States (Nos. 85-430, 85-432, 85-440, and 85-444).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
1. Regulatory background	2
2. Factual background	8
3. Proceedings below	11
Argument	15
Conclusion	35

TABLE OF AUTHORITIES

Cases:

American Farm Lines v. *Black Ball Freight Service*, 397 U.S. 532 21-22
Board of County Commissioners v. *United States*, 308 U.S. 343 25
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 23
Bulzan v. *Atlantic Richfield Co.*, 620 F.2d 278 34
Capital Cities Cable, Inc. v. *Crisp*, No. 82-1795 (June 18, 1984) 22
Christ..on & Welborn v. *DOE*, 773 F.2d 317, cert. denied, No. 85-81 (Oct. 15, 1985) 19, 25
Cities Service Co. v. *DOE*, 715 F.2d 572 32
Cities Service Co. v. *FEA*, 529 F.2d 1016, cert. denied, 426 U.S. 947 28
Citronelle-Mobile Gathering, Inc. v. *Edwards*, 669 F.2d 717, cert. denied, 459 U.S. 887 33
DOE v. *Louisiana*, 690 F.2d 180, cert. denied, 460 U.S. 1069 ..... 16, 22
DOE Stripper Well Exemption Litigation, In re, 578 F.Supp. 586 28
Exxon Corp. v. *DOE*, 744 F.2d 98, cert. denied, No. 84-188 (Dec. 3, 1984) 15
FPC v. *Interstate Natural Gas Co.*, 336 U.S. 577 33
Francis Oil & Gas, Inc. v. *Exxon Corp.*, 687 F.2d 484, cert. denied, 459 U.S. 1010 16
Grigsby v. *Doe*, 585 F.2d 1069, cert. denied, 440 U.S. 908 16

Cases—Continued: Page

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 29
Hecht Co. v. *Bowles*, 321 U.S. 321 28
Heckler v. *Campbell*, 461 U.S. 458 22-23
Heckler v. *Community Health Services*, No. 83-56 (May 21, 1984) 19
INS v. *Chadha*, 462 U.S. 919 15
Pennzoil Co. v. *DOE*, 680 F.2d 156, cert. dismissed, 459 U.S. 1190 .....4, 13, 16, 17, 19
Placid Oil Co. v. *FPC*, 483 F.2d 880, aff'd *sub nom. Mobil Oil Co.* v. *FPC*, U.S. 283 17
Porter v. *Warner Holding Co.*, 328 U.S. 395 .....28, 31, 33
SEC v. *Chenery Corp.*, 332 U.S. 194 22
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, cert. denied, 404 U.S. 1005 26
Sam Fox Publishing Co. v. *United States*, 366 U.S. 683 .. 32
Sauder v. *DOE*, 648 F.2d 1341 .....14, 25, 34
Schweiker v. *Hansen*, 450 U.S. 785 19
Tenneco Oil Co. v. *FPC*, 442 F.2d 489 26
Tully v. *Mobil Oil Corp.*, 455 U.S. 245 ..... 15, 26
Udall v. *Tallman*, 380 U.S. 1 18
United States v *Automobile Manufacturers Ass'n*, 307 F.Supp. 617, aff'd *sub nom. City of New York* v. *United States*, 397 U.S. 248 32
United States v. *Caceres*, 440 U.S. 741 21
United States v. *Lovasco*, 431 U.S. 783 16
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 23
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 23
Wisniewski v. *United States*, 353 U.S. 901 34

Constitution, statutes, regulations and rule:

U.S. Const. Amend. V (Due Process Clause) 32
Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note 2, 32
§ 209 .....32, 33, 34
§ 210 32
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* 3
15 U.S.C. 757(b)(2) 5

Constitution, statutes, regulations and rules—Continued: Page

Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.* 5
Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (Warner Amendment) 31
6 C.F.R.:
Pt. 150, Subpt. L (1974) 2
Section 150.354 (1974) 2, 3
10 C.F.R.:
Pt. 212, Subpt. D. (1975) 2
Section 212.72 (1975) ..... *passim*
Section 212.75 (1977) 6, 7, 8, 10, 12, 14, 21, 22
Fed. R. Civ. P. 56 23

Miscellaneous:
128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) 31
38 Fed. Reg. (1973):
p. 22536 2
p. 22538 3
pp. 22538-22543 2
39 Fed. Reg. (1974):
p. 1924 2
p. 1952 ..... 2, 3
40 Fed. Reg. 40832 (1975) 4, 5
41 Fed. Reg. (1976):
p. 4920 3
p. 4931 ..... 3, 5, 20
pp. 4936-4937 6
p. 4937 ..... 5, 6, 7, 20
p. 4938 ..... 3, 6
p. 4940 4
p. 4941 6
p. 36172 ..... 7, 22
p. 36184 ..... 7, 22
42 Fed. Reg. (1977):
p. 4409 7
p. 4414 8
p. 4415 8
p. 23723 4
p. 23726 4
p. 23730 4
p. 23740 4
p. 25659 4
S. Rep. 94-1119, 94th Cong., 2d Sess. (1976) 31

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-429

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 85-430

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 85-432

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL, PETITIONERS

v.

EXXON CORPORATION AND UNITED STATES OF AMERICA

No. 85-440

PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 85-444

NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-172a) is reported at 773 F.2d 1240. The opinion of the district court (Pet. App. 173a-268a) is reported at 561 F.Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985, and petitions for rehearing were denied on August 15, 1985 (Pet. App. 269a-270a). The petitions for a writ of certiorari in Nos. 85-429 and 85-440 were filed on September 13, 1985. The petitions for a writ of certiorari in Nos. 85-430, 85-432, and 85-444 were filed on September 14, 1985. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.

STATEMENT

1. *Regulatory background. a.* In 1973, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974), 38 Fed. Reg. 22536, 22538-22543 (1973); see also 10 C.F.R. Pt. 212, Subpt. D (1975), 39 Fed. Reg. 1924, 1952 (1974) (regulations as repromulgated under the

---

[1] "Pet." and "Pet. App." refer to the petition and appendix in No. 85-429.

[2] Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983). See Pet. App. 8a n.4, 173a n.1.

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating economic incentives for increasing domestic production. See Pet. App. 9a, 175a, 206a.

The "primary statutory mandate [was] to hold down prices of crude oil" by setting a ceiling for the price of domestic oil which was already being produced, referred to as "old oil." Pet. App. 197a. Old oil was defined as the monthly production from a property that did not exceed the property's "base production control level" (BPCL), which was its production for the same month in 1972. Production in excess of the property's BPCL was deemed "new oil" that could be sold at prices above the controlled price for old oil, thus avoiding any disincentive for producers to discover new sources of oil and to increase the amounts of oil recovered from properties already in production. See *id.* at 9a, 196a; 6 C.F.R. 150.354 (1974), 38 Fed. Reg. at 22538; 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952.

Central to the two-tier system was the definition of the "property" for which the BPCL and current production were calculated. See 41 Fed. Reg. 4931, 4938 (1976). The regulations defined property as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952 (repromulgating 6 C.F.R. 150.354 (1974)).[3] Left to their own devices, producers might seek to " 'obtain higher prices by arranging production in such a way as to shift oil into the "new" category to the maximum extent possible.' " Pet. App. 197a (citation omitted). Accordingly, the defini-

---

[3] In 1976, Section 212.72 was "grammatically altered" (Pet. App. 177a n.5) "without substantive change" (*id.* at 9a) to define property as "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 41 Fed. Reg. at 4920.

tion of property in Section 212.72 was intended to be interpreted in light of DOE's " 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' " *Ibid.* (citation omitted).

b This case arises out of DOE's interpretation of its definition of property, and hence its determination of the proper amount of new oil produced, with respect to unitized crude oil producing properties formed after 1972, the base year for computing the BPCL. Unitization is a "cooperative production process" for "large, multilease tracts which * * * [fomerly] operated as independent, competing properties." Pet. App. 177a. Under a "Unit Agreement," the "previously competing leaseholders * * * group their interests and form a single unit comprising all of the interests in the single reservoir of oil," which permits "enhanced recovery efforts [that] cause oil to flow underground across lease lines." *Id.* at 178a n.6. Following unitization, production from many wells is typically reduced or eliminated altogether while production from other wells within the unit is substantially increased. *Id.* at 15a, 178a n.6; 40 Fed. Reg. 40832 (1975).

DOE consistently interpreted the definition of property in Section 212.72 to require that the amount of new oil produced at units formed after 1972 be determined on a unit-wide basis, *i.e.*, by comparing the current monthly production from the unit with a BPCL consisting of the total amount produced during the same month in 1972 from all of the leases comprising the unit. See Pet. App. 10a; *Pennzoil Co.* v. *DOE*, 608 F.2d 156, 162-163 & n.11 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[4] The agency published this position in Ruling 1975-15, 40 Fed. Reg. 40832 (1975), where it stated that a unit's "BPCL is the total 1972 monthly production from

---

[4] Certain of these interpretations, Nos. 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, were later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, 25659 (1977). See Pet. App. 10a, 178a n.7.

all of the several leases that now comprise the unit." This approach was "dictated * * * by the need to compare like quantities, [during and after] 1972, in order to ensure a meaningful application of the new [oil]" provisions. *Ibid.* Otherwise, the "distorted actual production from any one lease comprising the unit" (*ibid.*; emphasis omitted) resulting from the shifts in production that normally accompany unit-wide production would allow producers to take advantage of the higher prices permitted for new oil far beyond the actual increase, if any, in their production of oil. As DOE explained, "the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual increases in production from those leases since the base period." 41 Fed. Reg. 4931, 4937 (1976). For these reasons, the agency concluded that "the unit agreement signifies one right to produce crude oil" and that "the unit [therefore] defines the property" under Section 212.72 of the regulations. 40 Fed. Reg. at 40832. See Pet. App. 10a, 177a-179a.

c. In December 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*, in light of changes in the condition of the nation's oil supplies. The statute permitted for the first time "price increases, without current increases in production, when the agency found that such price increases would give incentives for 'enhanced recovery techniques.' " Pet. App. 10; see *id.* at 179a-180a.[5] In response to the new statute and industry comments, in February 1976 DOE promulgated a new regulation effective prospectively from

---

[5] Absent such circumstances, Congress specifically prohibited regulatory changes permitting "an increase in the price for any volume of old crude oil production." 15 U.S.C. 757(b)(2). See Pet. App. 179a-180a.

February 1, 1976, 10 C.F.R. 212.75 (1977), 41 Fed. Reg. at 4941. Section 212.75 provided that a "producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first), establish a unit base production control level for the unit." Before that time, meaningful lease-by-lease comparisons would still be possible, and delaying implementation of the unit-wide BPCL would remove certain "disincentive[s] to the *prospective* unitization of properties." 41 Fed. Reg. at 4938 (emphasis added); see also *id.* at 4936-4937. The regulation defined "enhanced recovery" as "any method * * * of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." [6]

DOE also applied its more lenient approach toward unitized properties to existing units subject to Section 212.72 by rescinding ab initio "[t]hat limited portion of [Ruling 1975-15] which require[d] the producer *as of the effective date of unitization* to total all the BPCL's of participating leases and to treat the unit as a single property." 41 Fed. Reg. at 4937 (emphasis added). The agency reaffirmed the basic principle of Ruling 1975-15, embodied in 6 C.F.R. 212.72 (1975), that unitization normally requires unit-wide production comparisons in order to determine the true incremental increase in oil production; it concluded, however, that calculation of a unit-wide BPCL need not in every instance take place immediately upon unitization. 41 Fed. Reg. at 4937. Rather, DOE deter-

[6] The agency "ma[de] it clear" that its definition of enhanced recovery "would apply * * * so long as the '*energy employed* to move the crude oil through the reservoir is applied from extraneous sources.' The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938 (emphasis in original).

mined that a unit-wide BPCL need be implemented only after "there has been a significant alteration in pre-unitized producing patterns of the individual leases" or "enhanced recovery operations [have begun]." *Ibid.*; see generally Pet. App. 11a-12a, 180a-181a. The agency stated that at a later time it would further clarify the standard of a significant alteration in production patterns beyond its extensive reference in the preamble to the necessity for adopting a unit-wide BPCL where a meaningful comparison of pre- and post-base level production would not be possible on a lease-by-lease basis. 41 Fed. Reg. at 4937; see also 41 Fed. Reg. 36172, 36181 (1976). See generally Pet. App. 10a-12a, 180a-182a.

d. After receiving comments on the issue, DOE amended Section 212.75 in August 1976 to define "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables [*i.e.*, maximum permitted production levels] for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184. Once either of these events occurred, the BPCL was required to be calculated on a unit-wide basis. *Ibid.* At the same time, the agency further amended Section 212.75 "to eliminate any remaining disincentive to producers of new crude oil to enter unitized properties" by granting them the benefit of "imputed new oil," which ensured that newly formed units would be permitted to sell at least as much new oil as they had produced before unitization. 41 Fed. Reg. at 36182; see *id.* at 36184. See generally Pet. App. 12a, 182a.

e. In response to further comments, the agency clarified its amended Section 212.75 in Ruling 1977-2, issued in January 1977. 42 Fed. Reg. 4409. This ruling made clear that "Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1,

1976." *Id.* at 4415. Units formed prior to that date, by contrast, were governed by Section 212.72, as reflected in Ruling 1975-15 (as modified on February 1, 1976). *Ibid.* The later definition of "significant alteration in producing patterns" promulgated in August 1976 would "be considered as guidance" with respect to determining the date on which a unit BPCL would be required for these earlier-formed units. *Ibid.* Producers would be permitted to attempt "to justify the establishment of the date of significant alteration in producing patterns" on other reasonable grounds "on a case-by-case basis." *Ibid.* DOE also explained that the special incentive of "imputed new oil" provided in the amendment to Section 212.75 effective September 1, 1976, was available only for units undergoing a significant alteration on or after that date. 42 Fed. Reg. at 4414. See Pet. App. 12a, 182a-183a.

2. *Factual background.* a. Oil was discovered in the Hawkins Field in Texas in 1940. Within a decade, more than 200 companies and individuals were producing oil on more than 300 leases in the field; by 1969, petitioner Exxon Corporation[7] owned two-thirds of the field's production. The Texas Railroad Commission regulated the competitive production of oil from Hawkins Field by setting "production allowables" limiting the amount of oil that could be produced from each well. The Commission also established a "maximum efficient rate of production" (MER), which limited the volume of oil that could be pumped from the field as a whole each day. Under the Commission's MER rules, any shortfall in a lease's daily production under its allowable was distributed pro rata to all of the other capable leases in the field in order to allow total production to remain at the MER level. Pet. App. 14a-15a, 183-184a.

Several years before the promulgation of crude oil price

[7] Unless otherwise stated, we will use "petitioner" to refer to Exxon Corporation.

control regulations, petitioner and other owners of interests in Hawkins Field recognized the need to initiate enhanced recovery operations in order to arrest the decline in natural reservoir pressure that had occurred over the years and thereby to prolong the life of the field. In 1969, petitioner began to promote unitization of the field, which would spread the cost of recovery operations and permit the use of techniques that would move oil across lease lines. In preparation for unitization, the Commission authorized petitioner in 1969 to conduct a limited interim gas injection project and significantly increased the field's daily MER allowable. Pet. App. 15a-16a, 184a-185a.

During the extensive negotiations leading to a unit agreement, petitioner projected a net after-tax profit for the interest owners resulting from unitization of more than $250 million. This figure was based on an oil price substantially below the price at which *old* oil eventually sold under price controls. The unit agreement, ultimately signed in 1974, provided that petitioner would operate the unit beginning on January 1, 1975. Pet. App. 16a, 185a; R. 23881-23882, 24057, 24128-24130.

b. Following the promulgation of price controls in 1973, petitioner issued instructions to its employees requiring that each of its multi-lease units, including those (like Hawkins Field) formed after 1972, must be treated as a single property for price regulation purposes, and petitioner in fact followed those instructions at other post-1972 units. Pet. App. 16a-17a, 186a-187a. In July 1974 petitioner informed other Hawkins Field interest owners that, "[a]fter unitization, the field is treated as a single lease and exempt [*i.e.*, new] oil is calculated on a total field basis." R. 24366. As petitioner explained, this would result in "much less exempted oil volume than under nonunit operation." R. 24375; see also R. 24379, 24385. Notwithstanding the smaller amount of new oil that would be available under the unit price rule, 98.5% of

the working interest owners in Hawkins Field and 82% of its royalty interest owners had signed the unit agreement as of early August 1974. R. 24411; see also R. 18013-18014.

c. Shortly before unitization became effective, however, petitioner decided to depart from its prior representations to the Hawkins Field interest owners and from its pricing practices at other unitized fields by announcing that it would continue lease-by-lease accounting at Hawkins Field following unitization. Pet. App. 17a, 187a-188a. Once unitization began, petitioner was permitted by the state regulatory agency "to transfer production among wells within the unit, *at will.*" *Id.* at 16a (emphasis in original). Petitioner immediately took advantage of this new flexibility by shutting in more than 20% of the unit's wells, which enabled it to reduce production at 137 leases by nearly 320,000 barrels and to increase production by an equal amount at 65 other leases. *Id.* at 46a. Petitioner also substantially increased the volume of gas that it injected into the field. *Id.* at 49a-50a, 230a-231a.

In light of petitioner's continued lease-by-lease accounting following unitization, its transfer of production among leases "resulted in substantial increases in 'new' oil, without any actual increase in total production from the field." Pet. App. 46a. Petitioner "doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field." *Id.* at 234a (footnote omitted). It did not adopt a unit-wide BPCL until September 1, 1976. When it did so, petitioner performed its calculations under the more generous provisions of Section 212.75 of the regulations rather than under Section 212.72, even though the agency consistently had determined—and made explicit in January 1977—that Section 212.75 did not apply to units such as Hawkins Field that were formed prior to February 1976. Pet. App. 18a, 190a. Petitioner continued accounting on this basis until decontrol in 1981. Despite a "steady

decline in production" at Hawkins Field during the period that controls were in effect, petitioner's pricing practices ensured that "an *increasing* percentage of oil was accounted for by [petitioner] as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the [production] was classified as new oil." *Id.* at 190a (emphasis added).

3. *Proceedings below.* a. The United States filed this action in the United States District Court for the District of Columbia, seeking restitution from petitioner of the overcharges that it caused by improperly computing the amount of new oil produced at Hawkins Field.[8] On cross-motions for summary judgment, the district court denied petitioner's motion and granted the government's motion to require restitution of all overcharges with interest. Pet. App. 173a-268a. The district court held that Section 212.72 of the regulations required the adoption of a unit-wide BPCL immediately upon unitization and that petitioner suffered no prejudice from application of the less stringent "significant alteration" test as "guidance" for determining the date at which calculation of such a BPCL was required. *Id.* at 206a-210a, 213a-214a. The district court rejected petitioner's contention that the government was estopped from enforcing its regulations, noting that "a regulated party as sophisticated as [petitioner]" could not reasonably "ignore[ ] the only existing official pronouncements" in favor of "unauthorized views of agency employees ferretted out by [petitioner] which happen to coincide with [its] self-interest." *Id.* at 234a.

The district court also determined that DOE's "sliding scale of incentives, though complex, reasonably carried

---

[8] The government also sought civil penalties. The district court declined to assess a penalty, noting that while petitioner "ignor[ed] the unequivocal dictates" of the regulations, it "accurately represented its conduct to the agency." Pet. App. 260a. The government did not prosecute an appeal from this ruling. *Id.* at 5a.

out the conflicting objectives" of holding down prices while increasing production. Pet. App. 220a n.37. Accordingly, the agency did not act improperly in offering special benefits, such as imputed new oil, to producers that, unlike petitioner, had not found unitization economically attractive without those benefits. *Id.* at 214a-221a. "In refusing to go further and to extend greater benefits to pre-existing units" such as Hawkins Field, the district court reasoned, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Id.* at 220a. The district court also noted the "puzzling" nature of petitioner's attacks on Section 212.75, since even if that regulation were invalidated, Section 212.72, which set forth the definition of "property," nonetheless required implementation of a unit BPCL at Hawkins Field as of January 1, 1975. Pet. App. 227a n.39.

Giving petitioner the benefit of the relaxed requirement of Ruling 1977-2, and applying as guidance the definition in Section 212.75, the district court ruled that a unit BPCL was required under that definition as well on January 1, 1975, because a "significant alteration in producing patterns" occurred as of that date. Pet. App. 221a-231a. The district court reached this result in view of the increased injections of gas, increases in production allowables, and substantial transfer of production among leases that occurred simultaneously with unitization. The district court also concluded that, as a matter of law, petitioner had not offered any basis for the choice of a reasonable alternative date on which to begin unit-wide accounting. *Id.* at 226a-227a n.38.[9] Petitioner's reliance on the testimony of

---

[9] The district court addressed this issue even though petitioner had not actually contended that its evidence established a reasonable alternative date within the definition set forth in the regulations and the question therefore was "not before the court." Pet. App. 226a n.38; see also *id.* at 52a-53a & n.26.

petroleum engineers with respect to the underground drive mechanism of the Hawkins Field reservoir would be unworkable, the district court found, because it would substitute "hard to decipher underground phenomena" for the "clear, easily administered test" adopted by DOE. *Id.* at 222a.

Finally, the district court held petitioner liable for the full amount of the overcharges from Hawkins Field because petitioner had caused those violations of the law by its pricing and production decisions as operator of the unit. Pet. App. 239a-259a. In light of the impossibility of identifying the ultimate victims of petitioner's actions, the district court exercised its equitable powers to order the funds to be deposited in an escrow account for distribution to the states in connection with specified energy conservation programs. *Id.* at 255a-256a.[10]

b. The court of appeals affirmed. Pet. App. 1a-172a.[11] Relying on its decision in *Pennzoil Co.* v. *DOE, supra,* the court of appeals held that Section 212.72 "required the establishment of a single BPCL upon unitization of the Hawkins Field." Pet. App. 29a. It further noted that Ruling 1975-15, which made this interpretation explicit, was later only partially rescinded and that the agency's focus remained on "the fact that lease-by-lease accounting was not permissible after some alteration in production methods precluded any 'meaningful comparison' of current and base period production." *Id.* at 30a.

The court of appeals agreed with the district court that, even under the relaxed application of Section 212.72 and

---

[10] In view of the fact that the judgment was only a small fraction of petitioner's net worth, the district court relieved petitioner of the requirement that it post a bond pending appeal. See R. 31664.

[11] The panel was unanimous with respect to petitioner's liability. Judge Becker dissented in part solely on the ground that persons claiming to be actual victims of petitioner's overcharges should have been afforded an opportunity to prove the fact and amount of their damages. Pet. App. 93a-172a.

the significant alteration test, petitioner was required to adopt a unit BPCL for Hawkins Field as of January 1, 1975. *Id.* at 30a-39a, 43a-51a. The court of appeals rejected petitioner's contention that Hawkins Field never would have been unitized had the owners known that a unit BPCL was required, noting that petitioner "was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization." *Id.* at 40a.[12] The court of appeals also concluded that the special benefits for prospective unitization provided in Section 212.75 were not arbitrary. *Id.* at 41a-43a.

The court of appeals rejected petitioner's argument that it had established a reasonable alternative basis for unit-wide accounting for two reasons. First, "any meaningful comparison of production levels between 'old' and 'new' oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975." Pet. App. 53a. Second, "any resort to the testimony of expert petroleum engineers * * * would be unworkable, and therefore, not a reasonable basis for determination of the question." *Id.* at 54a-55a.

Relying on its decision in *Sauder* v. *DOE*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981), the court of appeals agreed with the district court that petitioner was liable for all of the overcharges from the unit because "[t]he undisputed evidence" (Pet. App. 57a) demonstrated that petitioner caused those overcharges. *Id.* at 55a-61a. The court of appeals also held that the district court had properly exercised its equitable discretion in requiring petitioner to pay the full amount of the overcharges in view of petitioner's failure to follow the clear commands of the regulations. *Id.* at 76a-77a. Finally, the court of appeals upheld the

---

[12] Unitization was attractive even under the unit BPCL requirement because it made possible the production of more oil for the unit as a whole than if the owners had continued competitive production and lease-by-lease accounting. See Pet. App. 40a; see also Pet. 2.

district court's order concerning disposition of the judgment. *Id.* at 78a-92a; see note 11, *supra*.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The Temporary Emergency Court of Appeals decided a narrow issue of regulatory construction under a program of emergency price controls that has long since expired and is of no continuing importance. As this Court has noted, Congress established TECA in order to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully considered the arguments presented in the petitions, and it rejected them in a thoughtful decision.[13] In these circumstances, further

[13] Petitioner Exxon's renewal (Pet. 27 n.24) of its prior attack (84-1142 Pet. 9-11) on the integrity and impartiality of the judges designated by the Chief Justice to serve on TECA is unwarranted and disrespectful of the judges who devote their time and energy to serving on that court. Petitioner's specious and impertinent claim that TECA's supposed partiality is "widely recognized" is not corroborated by the references on which it relies. Moreover, petitioner fails to support the implication of its allusion to the government's success in cases before TECA—*i.e.*, that those cases were wrongly decided. Rather, the outcome of cases in TECA reflects the insubstantial nature of many of the arguments raised in opposition to DOE positions, something further illustrated by Exxon's petition in this case. We note that our own informal survey indicates that the other courts of appeals have decided approximately 90% of appeals relating to the Emergency Petroleum Allocation Act on the merits in favor of the government. Finally, petitioner's characterization of TECA's treatment of the applicability of *INS* v. *Chadha*, 462 U.S. 919 (1983), to the price control program as "cavalier[]" (Pet. 39 n.33) is disingenuous at best. As petitioner well knows, that issue had already been conclusively decided against it by TECA in the court of appeals' comprehensive opinion in *Exxon Corp.* v. *DOE*, 744 F.2d 98 (1984), cert. denied, No. 84-188 (Dec. 3, 1984), and it therefore warranted little discussion here.

review is not warranted.[14]

1. Petitioner argues first (Pet. 27-29, 29-32)[15] that the regulations did not require it to adopt a unit-wide BPCL for Hawkins Field as of January 1, 1975. This argument is completely without merit.

a. The definition of property contained in Section 212.72 was promulgated by the agency in 1973. TECA has consistently held that that regulation, in itself, required the adoption of a unit BPCL immediately upon unitization. See *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 168 (1982), cert. dismissed, 459 U.S. 1190 (1983); *Francis Oil & Gas, Inc.* v. *Exxon Corp.*, 687 F.2d 484, 488, cert. denied, 459 U.S. 1010 (1982); *DOE* v. *Louisiana*, 690 F.2d 180, 190 (1982), cert. denied, 460 U.S. 1069 (1983); *Gingsby* v. *DOE*, 585 F.2d 1069 (1978), cert. denied, 440 U.S. 908 (1979). As TECA explained in *Pennzoil* (680 F.2d at 168):

> "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citation omitted.]

---

[14] Contrary to its repeated suggestions (Pet. i, 1, 2, 25, 42), the mere monetary size of petitioner's violations does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention. We note also that the constitutional garb in which petitioner dresses what are at bottom mundane challenges to an agency's exercise of discretion and interpretation of its own regulations was donned fairly late in the day. In almost 200 pages of briefs in the court of appeals, petitioner mentioned due process only twice. Cf. Pet. 2, 25, 26, 29, 31 n.29, 32, 42. Not until its petition for rehearing did petitioner expressly make its primary argument in constitutional terms, and then only very briefly (at 25-26). Thus petitioner "continues to shift ground" in this Court just as it did below. Pet. App. 53a n.28; see *id.* at 32a. See generally, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[15] Petitioner Exxon attacks only the finding of liability (questions 1-4). The petitioners in Nos. 85-430, 85-432, 85-440, and 85-444 support the finding of liability and seek review only of the question whether the district court abused its discretion in ordering that the judgment fund be distributed through the several States (question 5). These issues are completely independent.

> The application of this definition to unitized properties plainly contemplates a single "property" or right to produce arising from the several leases or fee interests constituting the unit.
>
> * * * * *
>
> [I]f upon unitization the "property" is no longer defined by each individual lease but by the unit as a single right to produce, it seems rather obvious that current production of the "property" after unitization must include all production from all of the leases within the unit.

Thus, even if DOE had done nothing further, Section 212.72 alone—which is how the regulations stood at the time that petitioner formed the unit and made its pricing decisions—required petitioner to adopt a unit BPCL for Hawkins Field on January 1, 1975. Pet. App. 38a.

Petitioner makes three responses.[16] First, it contends that the language of Section 212.72 required lease-by-lease accounting at unitized properties. Pet. 6, 27-28. This argument misreads the "plain language of the definition" and would in effect completely rewrite it. *Pennzoil*, 680 F.2d at 169; see *id.* at 168; Pet. App. 27a-29a. Moreover, it rests, like much of petitioner's argument (*e.g.*, Pet. 2, 9, 41), on an unreasonable and one-sided view that the overriding purpose of the price control regulations was to encourage production. As the courts below made clear, that goal was

---

[16] All of these responses miss the point that petitioner's liability rested on its failure to satisfy the more lenient "significant alteration in production" standard of Ruling 1977-2 rather than the immediate unit-wide BPCL requirement of Ruling 1975-15. See Pet. App. 38a, 43a-51a. That petitioner was unable to qualify for the benefits provided by the more lenient standard is no reason to invalidate the agency's construction of its own regulations, which plainly were not intended to provide benefits to all units regardless of circumstances. Cf. *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 905 (5th Cir. 1973), aff'd *sub. nom. Mobil Oil Co.* v. *FPC*, 417 U.S. 283 (1974).

only one of several and scarcely could be given controlling weight in disregard of the fundamental purpose of directly limiting the price increases that were plaguing the nation. See Pet. App. 9a, 175a, 197a, 206a.[17] Petitioner's reading of the regulation would utterly have failed to advance this purpose in a sensible fashion, for it would have allowed the creation on paper of new, higher-priced oil simply by shuffling production from one well to another without any actual increase in production. See pages 3-5, 10-11, *supra*. Indeed, it would have permitted crude oil producers to escape price controls altogether merely by joining forces with their neighbors and pumping all of their joint production out of one well rather than two. Finally, petitioner fails to give due deference to DOE's own interpretation, adopted in several contemporaneous rulings, that Section 212.72 required a unit BPCL immediately upon unitization, an interpretation faithful to the language of the regulation and to the underlying statutory and regulatory purposes. See, *e.g.*, Pet. App. 196a-197a; *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (citation omitted) (" '[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ").[18]

---

[17] One searches in vain through the 42-page petition for even an acknowledgement that one purpose of price controls was to control prices.

[18] The fact that several of the interpretations (unlike Ruling 1975-15) were not published in the Federal Register until 1977 (see note 4, *supra*) does not detract from their probative value in demonstrating the agency's view of what its own regulations required. Of course petitioner could not have been bound by unpublished rulings; the point, however, is that the validly promulgated and published regulation itself required the practice that petitioner refused to adopt. In view of both Ruling 1975-15 and the agency's other contemporaneous interpretations of Section 212.72 to require a unit BPCL immediately upon unitization, petitioner's characterization of this understanding of the regulation as a "later *post hoc* rationalization[] of the agency's litigation attorneys" (Pet. 28 n.26) is contrary to fact.

Second, petitioner appears to suggest (Pet. 28 n.27, 41), although it avoids directly invoking the doctrine, that the government should, in effect, be estopped from enforcing Section 212.72 on the basis of alleged informal oral advice by some agency employees that lease-by-lease accounting of unitized properties was permissible, an argument that petitioner waived in the court of appeals. See Pet. App. 77a-78a n.41. Consistently with this Court's rulings, TECA has repeatedly held, as it did here, that the views of individual officials could not reasonably be relied on as those of the agency and cannot estop the government from enforcing the law. See Pet. App. 33a-34a; *Christmann & Welborn* v. *DOE,* 773 F.2d 317 (1985), cert. denied, No. 85-81 (Oct. 15, 1985); *Pennzoil Co.* v. *DOE,* 680 F.2d at 171-172. See generally, *e.g., Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984); *Schweiker* v. *Hansen,* 450 U.S. 785 (1981). In any event, it is quite plain that petitioner did not rely on such advice in embarking upon unitization at Hawkins Field, for petitioner obtained the agreement of the other interest owners on the assumption that unit-wide accounting would be required, and it followed that practice at its other units as well. See pages 9-10, *supra.*[19]

Third, petitioner argues that DOE's partial rescission of Ruling 1975-15 in February 1976 vitiates all reliance on the agency's interpretation of Section 212.72 to require unit-

---

[19] Without pausing to acknowledge the findings of the courts below, petitioner baldly asserts that Hawkins Field never would have been unitized had the interest owners known that a unit BPCL was required. Pet. 5-6, 31. The court of appeals expressly rejected this speculation (Pet. App. 40a), and it defies common sense as well as the factual record. Petitioner and the other Hawkins Field interest owners were quite obviously far better off financially once the reservoir was unitized even with the unit BPCL required by Section 212.72 because unitization allowed the production of substantially greater quantities of oil than would otherwise have been possible. See Pet. App. 15a, 40a-41a, 208a-209a n.30.

wide BPCLs. Pet. 27-29. In making this argument, petitioner completely misconstrues DOE's February 1976 ruling. The agency reaffirmed the principle of Section 212.72 and Ruling 1975-15 that unitization normally requires the adoption of a unit BPCL because lease-by-lease comparisons of production are no longer meaningful. 41 Fed. Reg. 4931, 4937 (1976). However, because it recognized that production patterns are not in every case realigned simultaneously with unitization, the agency relaxed the requirement that producers adopt a unit BPCL immediately upon unitization in favor of the "significant alteration in producing patterns" standard, which both was more sensitive to the changes that necessitated adoption of a unit BPCL and increased the incentives for unitization. See Pet. App. 30a-31. The result was a less stringent application of Section 212.72. But the agency most emphatically did not establish the propriety of the lease-by-lease accounting practices followed by petitioner, which resulted in increasing amounts of new oil being reported even as actual production declined. *Id.* at 190a.[20]

---

[20] The agency made this clear at the time (41 Fed. Reg. at 4937):

> [I]n determining quantities of new * * * crude oil from a unit under the prior regulations, Ruling 1975-15 required that current total production from the unit exceed the total base production control levels for all the participating properties of the unit before any of the unit production qualifies as new crude oil.
>
> This result is dictated by the need to compare current production levels with like quantities of base production control levels in determining whether there has been an increase in production above base period levels. * * * [A] meaningful comparison could not ordinarily be obtained where current production figures from individual leases are compared with BPCL's from those leases, once there has been a realignment of producing patterns such as normally accompanies enhanced recovery. Thereafter, the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual

b. Petitioner argues as well (Pet. 29-31) that the new standard for determining the date for calculating new oil on a unit-wide basis embodied in the definition used in Section 212.75 could not be applied retroactively to Hawkins Field.[21] As both courts below noted, the argument is a curious one because invalidation of Section 212.75 would leave petitioner in no better position: it would still have been required to adopt a unit BPCL on January 1, 1975 under Section 212.72, as just discussed. Pet. App. 32a, 227a-228a n.39. In any event, retroactive application of the definition used in Section 212.75 is unobjectionable because it did not prejudice petitioner. Cf. *United States* v. *Caceres*, 440 U.S. 741, 752-753 & n.15 (1979); *American Farm Lines* v. *Black Ball Freight Serv-*

---

increases in production.

> * * * [U]ntil such time as there has been a significant change in producing patterns, [however,] there is no reason for the unit operator to depart from the historical practice of determining quantities of new crude oil on a lease-by-lease basis.
>
> * * * Once enhanced recovery operations begin [or producing patterns are significantly altered before the actual implementation of enhanced recovery operations], the producer will be required to calculate a unitized BPCL * * *.

[21] Petitioner appears at times to suggest that even under the definition set forth in Section 212.75 or some ill-defined "generic standard," a significant change in producing patterns did not take place on January 1, 1975. See, *e.g.*, Pet. 23 n.21, 32 n.29. However, the record clearly establishes the extent to which petitioner shifted production among leases as of that date, thereby rendering meaningful lease-by-lease comparisons—the only possible "generic" touchstone—impossible. See page 10, *supra*. Moreover, it is undisputed that production allowables and gas injections increased, thereby triggering a unit BPCL requirement under the regulatory definition (contrary to petitioner's contention, the regulations did not require that the injected gas be obtained from sources outside the reservoir, see note 6, *supra*). It would, indeed, have been flatly inconsistent with the statutory purpose for the agency to have permitted the wholly illusory creation of higher-priced new oil for which petitioner argues. See Pet. App. 43a-51a (finding as a matter of law that a significant alteration of producing patterns occurred at Hawkins Field on January 1, 1975).

ice, 397 U.S. 532, 539 (1970); see generally *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947). Ruling 1977-2, using the definition in the new Section 212.75, was more favorable to producers than Ruling 1975-15, which strictly applied the old Section 212.72. Moreover, in making its decision to unitize, petitioner relied only on the less favorable prior standard requiring the immediate adoption of a unit BPCL. Pet. App. 38a-41a; see pages 9-10, *supra.*

2. Petitioner argues next (Pet. 32-35) that the additional incentives for unitization provided by the regulations for units formed after February 1976 were irrational. The courts below thoroughly discussed and correctly rejected this contention. Pet. App. 41a-43a, 214a-221a. As the district court noted, petitioner merely "seeks to wage the battle it lost when Section 212.75 was promulgated." *Id.* at 220a. DOE "performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Ibid.* The differing incentives available to units that were formed at different times or not yet formed reasonably balanced the conflicting goals of increasing production and holding down prices by offering additional benefits only to those producers for whom unitization would not otherwise have been profitable. See *DOE* v. *Louisiana,* 690 F.2d at 189. The purpose of Section 212.75 was "to remove any * * * regulatory impediments to the *formation* of units." 41 Fed. Reg. 36172, 36182 (1976). Since it was unnecessary to encourage something already accomplished, it was completely reasonable not to apply the incentive provisions of Section 212.75 to pre-existing units such as Hawkins Field. TECA, which has special expertise in this area, found no basis for setting aside the agency's exercise of discretion. There is no basis (or need, given the fact that the regulations have expired) for this Court to do so either. See generally, *e.g., Capital Cities Cable, Inc.* v. *Crisp,* No. 82-1795 (June 18, 1984), slip op. 15; *Heckler* v.

Campbell, 461 U.S. 458, 466 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[22]

3. Petitioner argues next (Pet. 35-38) that it was denied an opportunity to present a reasonable alternative basis for beginning unit-wide accounting at Hawkins Field. Apparently, petitioner relies on the testimony of "fourteen petroleum engineering experts" concerning the underground drive mechanism of the reservoir and concluding that the most significant change occurred with the injection of inert gas beginning in 1977. See Pet. 17 n.15. Petitioner's argument misses the point. Both courts below fully credited petitioner's evidence. They properly concluded, however, that there was no factual dispute to be decided because petitioner's proferred alternative date was unreasonable as a matter of law. Pet. App. 52a-55a, 226a-227a n.38. Accordingly, no factual hearing was required. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973).[23]

The unreasonableness of petitioner's suggested date is apparent at once. Petitioner extensively realigned production patterns at Hawkins Field beginning on January 1, 1975. See page 10, *supra*; Pet. App. 46a, 228a-229a. As the district court explained, petitioner's "own measurements and analysis of production shifts at Hawkins Field show[ed] the dramatic changes that occurred in 1975," in-

---

[22] In any event, as the courts below noted, petitioner's attack, if successful, would result only in the invalidation of certain of the benefits provided by Section 212.75, not the extension of those benefits to petitioner. Pet. App. 43a n.17, 219a n.35.

[23] Petitioner's grandiose invocation (Pet. 35-36) of the *Accardi* doctrine, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is irrelevant. Nothing in the agency's regulations provided that a completely meaningless factual hearing must be held where the producer's suggested alternative date fails as a matter of law. See also Fed. R. Civ. P. 56 (providing for summary judgment where there is no issue of material fact).

cluding a shift of "almost 20 percent of 1975 production * * * across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." *Id.* at 229a-230a n.42. It was this substantial shift in production that allowed petitioner to claim most of its new oil even though total production from the field had not in fact increased, a result prohibited by the letter, and antithetical to the purposes, of the price control program. The agency had in fact repeatedly made crystal-clear that shifts such as those caused by petitioner at Hawkins Field rendered meaningful lease-by-lease comparisons impossible and therefore required the adoption of a unit BPCL. See, *e.g.*, *id.* at 53a; note 20, *supra.*

In short, petitioner's " 'realignment of the pattern of production would have played havoc with the federal pricing system had [the agency] permitted lease by lease property designations to continue in force after a unitization [because] [i]t would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all.' " Pet. App. 54a (citation omitted). The underground drive mechanism of the reservoir is thus irrelevant and, in any event, too complex and amorphous to be relied upon as a workable regulatory standard. *Id.* at 54a-55a, 226a n.38.

4. Petitioner lastly takes issue (Pet. 38-41) with the amount of the judgment. Petitioner's reliance on the supposed equities in its favor is, as the court of appeals observed, for the most part "simply a recasting of its unsuccessful claim * * * that the Government was estopped from challenging the legality of lease-by-lease accounting." Pet. App. 77a. Contrary to petitioner's argument, the courts below fully considered the relevant mitigating factors; indeed, the district court, after "careful consideration of the voluminous record," declined to assess civil penalties against petitioner. *Id.* at 259a-260a.

By the same token, however, the district court refused "to excuse [petitioner's] behavior." *Id.* at 260a. As the district court noted, petitioner's pricing practices "ignor[ed] [the] unequivocal dictates of the regulations" and departed from petitioner's own construction and application of the regulations at its other units. *Ibid.* The court of appeals adopted the findings of the district court in this regard, *id.* at 77a, and they plainly warrant no further review.[24]

Petitioner's argument that its liability should have been limited to its own production from Hawkins Field was correctly rejected by TECA (Pet. App. 55a-61a) on the basis of that court's prior precedents. Moreover, this Court has recently declined to review the identical contention in *Christmann & Welborn* v. *DOE,* 773 F.2d 317 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-81 (Oct. 15, 1985); see also *Sauder* v. *DOE,* 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981). There is no reason for a different result here.

Petitioner, which owned approximately 80% of the working interest in Hawkins Field, was the moving force behind unitization and the dominant force after unitization. Its liability rests on the fact that petitioner "caused the overcharges" throughout the unit and is therefore "fully liable for all of them." Pet. App. 55a. As sole operator of the unit, petitioner made all production and pricing decisions (*id.* at 57a (quoting district court's opinion)):

"[Petitioner] chose the wells to shut-in, the wells

---

[24] Petitioner's challenge to the award of prejudgment interest rests on the same " 'considerations of fairness' " that it urges in mitigation of the award generally. Pet. 40-41 (quoting *Board of County Commissioners* v. *United States,* 308 U.S. 343, 352 (1939)). The argument was properly rejected by both courts below. Pet. App. 71a-76a, 258a-259a. Similarly, petitioner's suggestion that consumers were not injured by its overcharges (Pet. 39) ignores the fact that, "because of the nature of the Entitlements Program, and the price control regulations, the effect of [petitioner's] wrong had been spread throughout the distribution chain, to the ultimate consumers." Pet. App. 78a; see pages 28-29, *infra.*

> where production was to go up or down, where to inject gas, and how much. . . . Most important, [petitioner] decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976."

Thus, "[t]he undisputed evidence * * * supports the conclusion that [petitioner] is responsible for all of the overcharges." *Ibid.*[25]

TECA correctly concluded that operator liability is in accordance with the scheme established by Congress and is necessary to avoid a multiplicity of actions across the country against the almost 2500 owners of interests in Hawkins Field, which would " 'plunge the agency into an "administrative quagmire" * * * [and] effectively block enforcement of oil price controls at Hawkins Field.' " Pet. App. 57a (citations omitted). This conclusion by TECA, the court most familiar with the regulatory program at issue in this case, see *Tully* v. *Mobil Oil Corp.*, 455 U.S. at

---

[25] Petitioner's argument (Pet. 39) that it cannot be held liable for overcharges attributable to Texaco's production from Hawkins Field was correctly rejected by TECA because the "uncontested facts established that [petitioner] did 'cause' th[ose] overcharges" as well as all of the others at the Hawkins Field Unit. Pet. App. 62a. Petitioner also renews in this Court (Pet. 23-24 n.22) a contention that TECA correctly ruled had not been properly preserved for appellate review (Pet. App. 66a-67a) concerning whether a small amount of the judgment had inadvertently been based on production from outside Hawkins Field. This claim apparently relates to production by a few owners whose tracts were in fact within the unit but who had not signed the unit agreement, production that in our view is properly encompassed within the judgment. In reviewing the record, we have not ascertained that any sales from tracts not within the Hawkins Field Unit were included in the judgment. In any event, petitioner's argument would have been more appropriately addressed to the lower courts through a motion to alter or amend the judgement had petitioner not already waived it.

248, is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

5. Finally, the petitioners in Nos. 85-430, 85-432, 85-440, and 85-444[26] argue that the district court abused its discretion in ordering that restitution of Exxon's overcharges be made through the several States rather than allowing consumers and direct and indirect purchasers of crude oil to attempt to prove that they suffered actual and quantifiable losses as a result of Exxon's violations. These petitioners intervened only very late in the day in the district court and offered little support there for the contentions that they now press.[27] Although for the most part they do not now detail the basis on which they are entitled to the overcharges, the remedy petitioners—which include refiners, distributors, and ultimate consumers of crude oil—offered in the court of appeals competing and

---

[26] We refer to these parties as the "remedy petitioners."

[27] After the district court had taken the full case under advisement following completion of briefing and oral argument, two groups moved to intervene with respect to the remedy for Exxon's overcharges. One was a group of crude oil refiners that conceded that the remedy issue was a purely legal question capable of resolution by summary judgment on the existing record. See R. 38337. The other was a group of independent gasoline retailers that did not offer any evidence or request a hearing. See R. 38986. After entry of judgment, various other groups sought to intervene. The district court granted each application to intervene for purposes of appeal. Pet. App. 82a n.45, 130a-134a. Given the content and timing of the remedy petitioners' motions in the district court, the full consideration of their arguments by the court of appeals, and the legal nature of the question of the district court's authority to adopt the restitutionary remedy that it ordered, there is no doubt that the remedy petitioners were afforded ample opportunity to be heard. Indeed, many of their arguments should properly be considered waived in view of the proceedings in the district court.

mutually contradictory theories for why each of them has the most compelling claim to the award.

a. The district court's order represents an unexceptional exercise of its broad equitable discretion to make restitution in a workable manner consistent with the goals of the statutory and regulatory scheme. TECA affirmed on the basis of its understanding of the operation of a complex set of regulations, no longer in effect, that governed pricing decisions in the petroleum industry. The court of appeals simply upheld one possible remedy as having appropriately been adopted in this case, without mandating the same approach in future cases. Moreover, the remedy adopted by the district court has no application outside the narrow confines of the now-defunct price control program because of the special nature of the government's cause of action and the unusual operation of the regulations at issue. See, *e.g.*, *In re DOE Stripper Well Exemption Litigation,* 578 F. Supp. 586, 592-593 (D. Kan. 1983) (noting differences between public price control and private antitrust actions). Finally, DOE recently has developed a restitutionary policy and proposed legislation that would apply to overcharges recovered in other oil price control cases. See 85-444 Pet. App. B1-B10, B14, B19-B22. In view of the factbound nature of the decision below, the procedural circumstances in which it was made, and its lack of continuing importance, further review by this Court is not warranted.

b. In any event, the remedy fashioned by the district court is well within the broad scope of its remedial power " 'to do equity and to mould [its] decree to the necessities of the particular case.' " *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), quoting *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944). Under the "Entitlements Program" then in effect, refiners with proportionally greater access to lower-priced old oil were required to make cash payments to refiners with relatively less access to such oil. In this way, the regulations "spread the benefits of access

to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); see Pet. App. 87a-88a. 247a-248a. Other regulations permitted refiners to pass through increased costs to their customers. Pet. App. 87a-89a, 249a. "As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges * * * were borne by ultimate consumers of petroleum products throughout the entire country." *Id.* at 249a (footnote omitted).[28]

It is little wonder then that both courts below found that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." Pet. App. 250a.[29] As the court of appeals concluded, "any attempt to trace increased costs attributable to the [Hawkins Field] overcharges

---

[28] Certain of the remedy petitioners argue (*e.g.*, 85-430 Pet. 23) that this conclusion is questionable in light of the decontrol of prices of certain petroleum products before 1981. The absence of a specific regulation permitting refiners to pass through increased costs for those products, however, does not mean that the additional costs were not in fact passed through, nor does it simplify the ultimate task of identifying the actual victims of Exxon's overcharges and the extent of their injury. See generally *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968) (noting difficulty of determining actual effect of price change "in the real economic world rather than an economist's hypothetical model").

[29] Indeed, it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible. See Memorandum in Support of Conditional Motion of Indicated Refiners to Intervene 5, R. 38973 ("it is impossible to trace the impact of the overcharges directly to any subsequent purchasers"); Memorandum of National Freight et al. in Support of Motion to Intervene 2, R. 38547 ("it is administratively impracticable to attempt to entertain specific claims based on specific overcharges to identified customers"); Gladieux Br.

would require a full scale audit of the entire petroleum industry, and * * * any effort to do so would be futile." *Id.* at 88a. There is no basis for this Court to set aside this concurrent conclusion of both TECA and the district court.[30]

Nor is there any basis on which to disagree with TECA's

---

9 ("[n]o such findings could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any Court or administrative agency"); Marathon Br. 17 ("proving passthrough of overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements").

[30] The remedy petitioners rely on a report issued by DOE's Office of Hearings and Appeals (OHA) in another case (85-432 Pet. App. A321-A385) to argue (*e.g.*, 85-432 Pet. 13-14) that econometric modeling techniques are available that could identify within a broad range the percentages of overcharges that were absorbed by refiners. As OHA itself made clear, however (*e.g.*, 85-432 Pet. App. A343), and as DOE has reaffirmed, these figures "say [] nothing about the amount of the overcharges any particular refiner may have absorbed. * * * [S]ome refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more." 85-444 Pet. App. B3 (DOE Statement of Restitutionary Policy). Thus, "any matching between the amount a particular refiner receive[d] and the amount of harm [that it] suffered * * * [would be] purely coincidental." *Id.* at B4. Moreover, "refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. * * * The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method." *Id.* at B5-B6. Finally, even OHA's modeling estimates entailed "great inexactitude." *Id.* at B4; see 85-432 Pet. App. A383 (concluding that refiners as a class may have absorbed as little as 2.7% or as much as 8.1% of the overcharges). Certainly no court should be *required* to undertake the expense and delay of a claims procedure based on econometric models so inherently imprecise.

In a supplemental brief in support of their petition in No. 85-430, Marathon Petroleum Co., et al. (Marathon) attack OHA's actual report, primarily on the basis of correspondence from a Member of

conclusion that the remedy adopted by the district court is "equitable and fair, and a reasonable method of compensating the consuming public for the [Hawkins Field] overcharges." Pet. App. 91a. The district court modeled its remedy on the one adopted by Congress in the Warner Amendment, Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (85-432 Pet. App. A316-A319), with respect to restitution of other petroleum overcharges. Pet. App. 254a-256a.[31] By earmarking funds for specific energy conservation programs, the Warner Amendment was designed "to benefit the class of persons injured by [oil price control] violations." 85-432 Pet. App. A316. Congress recognized that these conservation programs benefit the public at large by reducing our dependence on foreign oil. See S. Rep. 94-1119, 94th Cong., 2d Sess. 52 (1976); see also Pet. App. 256a. The remedy in this case thus "accomplishes the intent of Congress" (Pet. App. 91a) by

---

Congress concerning an earlier draft of the report that was not adopted. TECA correctly rejected Marathon's eleventh-hour attempt to interject this incompetent and irrelevant evidence into the record (85-430 Supp. Br. App. 1a), and there is no reason for this Court to do otherwise. The OHA report recently was issued in a completely separate case and was not cited by either court in this action. See Pet. App. 80a n.43. The unsubstantiated allegations on which Marathon relies therefore could not possibly affect the outcome of the instant case.

[31] Contrary to the remedy petitioners' argument (*e.g.*, No. 85-430 Pet. 19), Congress did not intend through the Warner Amendment to prohibit courts from adopting similar restitutionary remedies in other cases. See 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (remarks of Sen. Kennedy). There is neither an express nor an implied indication in the Warner Amendment that Congress intended to limit the broad remedial authority inherently possessed by the courts in cases of this kind, see *Porter* v. *Warner Holding Co.*, 328 U.S. at 398, a limit that would have been a simple matter to articulate had Congress desired to do so. Finally, the district court made it clear that it was not relying on any implication of authority in the Warner Amendment itself but only on its "broad equitable powers to order restitution." Pet. App. 256a (footnote omitted).

helping "to relieve consumers of some of the burden of towering oil costs" (*id.* at 256a), a burden that was increased by "[t]he colossal scale of Exxon's wrongdoing" (*ibid.*). As TECA concluded (*id.* at 92a (footnote omitted)):

> While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

There is simply no warrant for upsetting the reasoned exercise of discretion affirmed below.

c. The remedy petitioners contend, however, that the failure of the courts below to permit them to present evidence of the fact and amount of their actual injuries was inconsistent with due process and restitutionary principles. This argument is completely without merit. This case is a government enforcement action pursuant to Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. As TECA repeatedly has emphasized, "[a]ctions by the United States under ESA Section 209 are taken to enforce public, not private rights." Pet. App. 82a-83a (quotation marks and citations omitted). Section 209 does not create a cause of action on behalf of private persons who were injured by violations of the petroleum price regulations—that was provided by Congress in Section 210 of the Act, which is not at issue here. Because the remedy petitioners were not entitled to recover damages by way of restitution in this action, due process did not require that they be permitted to present evidence in support of their claims. Indeed, as the court of appeals noted, they were not even proper intervenors as of right. Pet. App. 83a (quoting *Cities Service Co.* v. *DOE*, 715 F.2d 572, 573-574 (Temp. Emer. Ct. App. 1983)). Cf. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689

(1961); see also, *e.g.*, *United States* v. *Automobile Manufacturers Ass'n,* 307 F. Supp. 617 (C.D. Cal. 1969), aff'd *sub nom. City of New York* v. *United States,* 397 U.S. 248 (1969). The remedy petitioners thus were afforded ample, or more than ample, process by being permitted to raise their arguments below; nothing in the Due Process Clause requires that those arguments be accepted.

The cases on which the remedy petitioners rely (*e.g.*, 85-430 Pet. 12, 16) are unavailing. None of these cases establishes a protected property interest in a restitutionary fund that results from a government enforcement proceeding or otherwise requires that such a fund be distributed, whatever the administrative costs, on an individual basis to persons claiming to be the ultimate victims of illegal private activity. In *FPC* v. *Interstate Natural Gas Co.,* 336 U.S. 577 (1949), for example, funds had been paid into the court of appeals pursuant to that court's stay of an administrative order reducing natural gas rates. This Court held that, to the extent possible without "prolonged litigation," the court of appeals was required to "determine who suffered a loss as a result of the court's action in granting the stay." *Id.* at 584. Nothing in the Court's opinion purports to impose a duty on courts of equity to hold proceedings to attempt to identify the ultimate victims of an overcharge (especially one not resulting from an erroneous court order) where that has reasonably been determined to be impossible. Similarly, in *Porter* v. *Warner Holding Co., supra,* the Court held only that federal courts possess inherent equitable authority to order that a landlord's overcharges, which violated the Emergency Price Control Act of 1942, be restored to its tenants. The Court did not undertake to limit that equitable authority in the manner for which the remedy petitioners contend.

In sum, the restitutionary remedy under Section 209 is a government enforcement mechanism whose "central purpose * * * is to determine the amount by which the wrong-

doer has been unjustly enriched, and then to make him disgorge that amount." *Citronelle-Mobile Gathering, Inc.* v. *Edwards,* 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982).[32] Section 209 "is not designed to provide redress for a victim who has suffered an injury because of a violation of a [price control] regulation." *Bulzan* v. *Atlantic Richfield Co.,* 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980). If compensation results, it is only as a "by-product of the agency's effort to reestablish compliance with its regulatory scheme." *Ibid.* Accordingly, Section 209, which evinces no intention "to limit the power of the courts or the agency * * * to a particularly strict interpretation of restitution," *Sauder* v. *DOE,* 648 F.2d at 1348, neither establishes in private persons an entitlement to disgorged funds nor requires a wasteful and ultimately futile attempt to determine the extent to which various persons or groups of persons were injured. While the district court was not compelled to shape the remedy precisely as it did, it acted well within its discretion by patterning the remedy after one established by Congress and directing that the funds be used in a manner that will help to undo the damage caused by the regulatory violations in this case.

---

[32] TECA carefully distinguished the factual circumstances presented here from those in *Citronelle-Mobile,* which, it observed, involved only a single refiner, a single product, and identifiable customers. See Pet. App. 85a-87a. Even if the remedy petitioners were correct in contending (*e.g.,* 85-432 Pet. 24) that there is a conflict between that case and this one, the existence of such an intra-circuit conflict, which TECA is well able to resolve in the future, would be an argument against, not for, review here. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

THOMAS C. NEWKIRK
Chief Counsel
Economic Regulatory Administration
Department of Energy

DECEMBER 1985

---

* The Solicitor General is disqualified in these cases.

U.S. GOVERNMENT PRINTING OFFICE: 1985—491-507/20108

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR
CLERK

No. 85-430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY and TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corporation

* Counsel of Record

[Other counsel for petitioners are listed on the inside front cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:

ROBERT H. COMPTON
ASHLAND PETROLEUM COMPANY
P.O. Box 391
Ashland, Kentucky 41114
(606) 329-3725

JAMES W. SHADDIX
PENNZOIL COMPANY
P.O. Box 2967
Houston, Texas 77001
(713) 546-8431

RALPH J. MAYNARD
ALFRED B. SMITH, JR.
TENNECO OIL COMPANY
P.O. Box 2511
Houston, Texas 77002
(713) 757-4249

ERIC SCHWARTZ
TOSCO CORPORATION
2401 Colorado Avenue
Santa Monica, California
90406-2401
(213) 207-7083

THOMAS A. DONOVAN
JUDITH A. MACKAREY
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
Counsel for
Ashland Oil, Inc.

JOHN P. MATHIS
CATHERINE C. WAKELYN
BAKER & BOTTS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 457-5500
Counsel for
Pennzoil Company and
Tenneco Oil Company

KENNETH L. BACHMAN, JR.
EUGENE M. GOOTT
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
Counsel for Tosco Corporation

TABLE OF CONTENTS

	Page
INTRODUCTION	1
1. The Award to State Governments Approved by the Court of Appeals is Not Restitution	2
2. The Court of Appeals Contravened a Statute, Decisions of This Court, and Decisions of other Courts of Appeals in Approving the Denial to Petitioners of a Hearing on the Remedy Issue	4
3. A Hearing on the Remedy was Particularly Important in This Case	6
4. The Government Concedes that a Critical Factual Issue Exists	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 4

Bulzan v. Atlantic Richfield Co., 620 F.2d 278 (TECA 1980) 3, 4

Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717, *cert. denied*, 459 U.S. 844 (1982) 3

Donovan v. University of Texas, 643 F.2d 1201 (5th Cir. 1981) 4, 6

Federal Power Commission v. Interstate Natural Gas Co., 336 U.S. 577 (1949) 3

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 9

Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d Cir. 1971) 4, 6

Hodgson v. Quinada, 498 F.2d 5 (9th Cir. 1974) 4, 6

Marshall v. Quik-Trip Corp., 672 F.2d 801 (10th Cir. 1982) 4, 6

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 3, 5

Sauder v. DOE, 648 F.2d 1341 (TECA 1981) 3

U.S. CODE:

28 U.S.C. § 2041 ..... 2, 4, 5

28 U.S.C. § 2042 ..... 2, 4, 5-6

OTHER STATUTES:

§ 209 of the Economic Stabilization Act, 12 U.S.C. § 1904 note 1, 4

Warner Amendment, Pub. L. No. 97-377, 96 Stat. 1830 (1982), Section 155 ..... 7, 8

LEGISLATIVE MATERIALS:

128 Cong. Rec. 51570, col. 1 (daily ed. Dec. 20, 1982) 8

H.R. 4972, 98th Cong., 2d Sess. 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-430

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY and TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

INTRODUCTION

The statute governing this action, § 209 of the Economic Stabilization Act, requires the court to order "restitution" to those injured by the overcharges. All courts and parties who have considered the question agree that at least initially petitioners and other refiners were forced to bear the two-billion-dollar cost of the HFU overcharges. In this case the court of appeals:

1. held that "restitution" does not require that money be restored to those injured, but may be paid to state governments who have not shown injury, contrary to decisions of this Court in situations indistinguishable from the present;

2. held that even though it was not clear who had been injured by the overcharges, no hearing on that question need be held before awarding the money to state governments, contrary to decisions of this Court and the command of 28 U.S.C. §§ 2041, 2042, and in conflict with the decisions of other courts of appeals interpreting those statutes;

3. agreed with the federal government's argument that holding a hearing to determine who had been injured by the HFU overcharges would be futile even though (a) the Department of Energy's Office of Hearings and Appeals had found after a hearing that it was possible to do so and that petitioners had been injured and (b) senior DOE officials had forced suppression and alteration of those findings because it is the government's "policy" to defeat restitution to persons injured and instead to obtain similar overcharges for the federal treasury.

4. granted summary judgment on the remedy issue even though, as the government now concedes, an issue of fact existed with respect to $1 billion even under the rationale adopted by the court of appeals.

The oppositions to certiorari do not seriously controvert any of these showings.

1. The Award to State Governments Approved by the Court of Appeals Is Not Restitution.

Without dealing directly with the authority cited in the Petition, the government's opposition seeks to justify the decision below on the basis of TECA's view that the "central purpose" of restitution is only to make the wrongly enriched person disgorge the amount of the enrichment, and that repayment to the victim is unnecessary. Govt. Opp. 32.[1]

---

[1] In this reply, we refer to the Brief for the United States in Opposition as "Govt. Opp." and the Brief for the State Respondents

As we pointed out in the Petition (at 15-16), however, this view contradicts holdings of this Court in *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) and *Federal Power Commission v. Interstate Natural Gas Co.*, 336 U.S. 577, 582 (1949), that restitution means restoration of the *status quo* by "the *return* of that which rightfully belongs to the purchaser. . . ." and cannot be effected "by payment of the fund to those who show no loss. . . ."

Thus the government has succeeded only in emphasizing that the view of restitution taken by the court of appeals is unique and in conflict with holdings of this Court and other authority, such as the Restatement of Restitution.[2]

---

as "State Opp.". We refer to the Appendix to the Petition in No. 85-429 as "Ex. App." and the Appendix to the present Petition as "Pet. App."

Lists of parent, affiliate and subsidiary companies required by this Court's Rule 28.1 appear in Appendices VIII-X to the Petition.

[2] TECA's own citation of authority for its treatment of this question is dubious. In the present case, it relied upon its earlier characterization of restitution in *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722, *cert. denied*, 459 U.S. 877 (1982). See Ex. App. 91a. On the page of the *Citronelle* opinion thus cited, there is a 10-line indented quotation that TECA identified as coming from comment e to Section 1 of the Restatement of Restitution, beginning "Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense. . . ." However, that purported quotation is completely inaccurate. No such language is found at the cited portion, or, we believe, anywhere else in the Restatement, which, to the contrary, states that compensation of the person injured is the basis of restitution. See Pet. 16 n. 10. Nor do the other cases cited by the government provide any support for TECA's conclusion that compensation of the person injured is not a primary goal of restitution. In *Sauder v. DOE*, 648 F.2d 1341 (TECA 1981), it was taken as beyond question that restitution to the person overcharged would be made. The quotation from *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (TECA 1980), at page 34 of the government's brief is misleading. The beginning of that sentence, not quoted by the

The government does assert that the remedy was justified as an exercise of broad equitable jurisdiction (Govt. Opp. at 28). But as this Court has held, for all the " 'flexibility' " of equity jurisprudence, ". . . when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (footnote and internal citation omitted). Here, Congress has made it clear that it intended by use of the term restitution to authorize return of the overcharge funds to those who originally paid them. Pet. 15. Invocation of equity powers cannot serve to alter that command.

2. The Court of Appeals Contravened a Statute, Decisions of This Court, and Decisions of Other Courts of Appeals in Approving the Denial to Petitioners of a Hearing on the Remedy Issue.

a. The government's opposition fails to mention 28 U.S.C. §§ 2041, 2042, which were designed by Congress to apply where, as here, entitlement to funds in court is unclear after litigation. Pet. 16-17. At least six other courts of appeals have applied these provisions in similar circumstances. *Id.* at 17. Several of those cases were government enforcement actions, indistinguishable from the present, in which the identity of the persons entitled to compensation was unclear at the termination of the action. *Marshall v. Quick-Trip Corp.*, 672 F.2d 801, 807-8 (10th Cir. 1982); *Donovan v. University of Texas*, 643 F.2d 1201, 1208 n. 16 (5th Cir. 1981); *Hodgson v. Y. B. Quinada*, 498 F.2d 5, 6 (9th Cir. 1974); *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535-536 (3d Cir.

---

government, explicitly states that it refers to "administraitve remedies," not the judicial remedy of § 209. *Bulzan* does not concern § 209.

1971). The government has not even tried to deal with this conflict.

b. Independently of 28 U.S.C. § 2041, this Court's decisions also required that petitioners be given the opportunity to show injury before a remedy was chosen by the district court. The government's attempt to avoid the effect of these cases is not successful. The government first asserts that petitioners could have no proper role in a government enforcement action (Govt. Opp. 32). But petitioners were not seeking to participate in the enforcement aspects of the case. They attempted to participate on remedy issues only if it developed that those issues would actually be presented (i.e., if liability were first established). Petition at 5-6.

This approach was correct. In *Porter*, which was itself a federal government action brought to enforce price control regulations, this Court specifically addressed the situation now presented:

> [The district court] may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; *if necessary, persons not originally connected with the litigation* may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances.

328 U.S. at 398 (emphasis added).[3] Similarly, 28 U.S.C.

---

[3] The government answers only that this statement was not part of the holding in *Porter*. Govt. Opp. at 33. But the quoted portion was not an offhand remark. It was an integral part of the Court's general holding that a district court's full equity powers are available in such cases as the present as long as they are exercised consistently with "clear and valid legislative command[s]." 328 U.S. at 398. Indeed the states essentially admit (State Opp. at

§ 2042 authorizes petitions to be filed claiming entitlement to funds already "deposited in court." Other courts of appeals have already anticipated filing of petitions to be filed by non-parties at the conclusion of government enforcement cases. See *Quick-Trip, University of Texas, Y.B. Quinada,* and *Wheaton Glass, supra* at 4.[4]

3. A Hearing on the Remedy was Particularly Important in This Case.

a. We submitted the Supplemental Brief in support of certiorari to show that the court of appeals was wrong to have concluded that no hearing on remedy was necessary because as a matter of law it was impossible to identify those injured by the HFU overcharges. The government has failed to negate that showing.

The government's primary claim is that the Supplemental Brief is based on "incompetent and irrelevant evidence." Govt. Opp. at 31 n. 30. This, however, is hollow bluster. The government fails to point out that the DOE has since been compelled to make public the

---

22-23) that this language on equitable powers was intended to underscore the court's power to bring in other parties and to encompass other claims so as to work complete justice. That it has long been an attribute of equity that additional parties be brought in as their interest appears was shown in the Petition at 15 n.9.

[4] For this reason, the assertions of the federal government (Opp. at 27 and n.27) and the States (at 28-29) that the attempted intervention came too late are wide of the mark. While it is true that some petitioners did not seek intervention until after the district court had issued its Memorandum and decision of March 25, 1983, that is because the district court prevented them from doing anything else. See Pet. 5-6, 9. In finally granting intervention, the district court found that intervention was timely because the court itself had delayed participation of intervenors until the entire case had been decided: "In this case the court, at the request of DOE and Exxon, had stayed earlier motions to intervene by industry applicants pending resolution of the issue of Exxon's liability for the overcharges." Pet. App. 9a. The court of appeals noted this point. Ex. App. 82a n.45.

full original OHA report.[5] The text of that report contains all of the material quoted in Rep. Dingell's letters and confirms everything he said about it. DOE's own letter to Rep. Dingell confirmed his assertions that DOE had forced OHA to change its findings and conclusions for "policy" reasons. Supplemental Brief at 6, 10a-15a.[6]

b. The district court invoked a remedy—payment to the states—which was not urged by any party then before it and has no support in the record. The federal government and the states seek to support the remedy by referring to the intention of Congress in enacting the Warner Amendment. Govt. Opp. 31; State Opp. 18-22. This merely emphasizes that the district court acted as a legislature, not a court, in effect enacting a tenfold increase in a statute of Congress. Moreover, the sponsor of the Warner Amendment in the Senate and the Chairman of the Energy and Commerce Committee in the House both insisted in debate that enactment of the Amendment was not to serve as a precedent for disbursement of additional funds. Pet. 19, n. 16. Thus, there was no basis for judicial extension of that law.[7]

---

[5] A full copy of this 93-page report is being lodged with the Clerk.

[6] The government does not deal with any aspect of the showing in the Petition (at 13-14, 17) and Supplemental Brief that its role in the remedy issue has been improperly dominated by its desire to defeat the claims of others and obtain future funds for itself. Nonetheless, the government does refer pointedly to DOE's "Statement of Restitutionary Policy as it would apply to future cases (Govt. Opp. at 28), although without mentioning that the substance of that policy is to obtain those overcharges for the federal treasury. See Pet. 13, n.8. Finally, the proposed legislation referred to by the government (Govt. Opp. 28) was H.R. 4972, 98th Cong., 2d Sess. There was never any hearing, debate, or vote on that bill, and it died at the end of that session. There is no legislative activity on this issue in the 99th Congress.

[7] The government's citation of a floor statement by Senator Kennedy is unavailing (Govt. Opp. 31 n.31). Senator Kennedy

4. The Government Concedes that a Critical Factual Issue Exists.

The court of appeals based its approval of the remedy on the finding that as a matter of law the system of price controls on all refined products "was designed to insure that" increased costs of crude oil "would be passed along [by refiners] to the ultimate consumers," and that the complexity of those controls made the tracing of passthrough of injury futile. Ex. App. 87a, 89a. The Petition shows that because half (by volume) of all refined products were not covered by price controls, the rationale of the court of appeals in approving the remedy does not apply as to about half of the overcharges. Pet. 22-23.

The government has been forced to agree that half of refined products were not covered by price controls. Govt. Opp. at 29 n. 28. It effectively concedes that the rationale of the court of appeals was wrong as to half of the amount of the remedy in this two-billion-dollar case. Further, the government expressly admits that as to this unregulated half of refiner sales, it is a question of fact whether cost passthrough occurred. It does this by claiming that the lack of a regulatory mechanism as to uncontrolled products "does not mean that the additional costs were not *in fact* passed through. . . ." Govt. Opp. at 29 n. 28 (emphasis added).[8] Thus the government

---

described the Warner Amendment as authorizing DOE to distribute "up to $200 million" and said about its intent, "The conferees did not specifically address the disbursement of other funds collected as a result of overcharges." 128 Cong. Rec. S1570, col. 1 (daily ed. Dec. 20, 1982). This is consistent with statements of the Senate and House leaders that the Amendment was not intended to serve as a basis for future disbursements.

Indeed, the government's point appears to be the nonsensical one that because the Warner Amendment does not explicitly bar the remedy ordered in the present case, it must be read as authorizing it.

[8] The government then argues that the difficulty of ascertaining whether refiners passed through cost increases to their customers

concedes that a billion-dollar fact issue was resolved without a hearing.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

ROBERT H. COMPTON
ASHLAND PETROLEUM COMPANY
P.O. Box 391
Ashland, Kentucky 41114
(606) 329-3725

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corporation

THOMAS A. DONOVAN
JUDITH A. MACKAREY
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500
Counsel for
Ashland Oil, Inc.

* Counsel of Record

---

should bar refiners from recovering, citing Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). That case holds exactly the opposite. Under it party—or even an entire industry—forced to pay an illegally high price (as refiners were forced by DOE's entitlements regulations to pay the cost of the HFU overcharges) may not have its recovery defeated by the possibility that market forces may have permitted that person or industry to pass those increased costs on. *Id.* at 491-494.

JAMES W. SHADDIX
PENNZOIL COMPANY
P.O. Box 2967
Houston, Texas 77001
(713) 546-8431

RALPH J. MAYNARD
ALFRED B. SMITH, JR.
TENNECO OIL COMPANY
P.O. Box 2511
Houston, Texas 77002
(713) 757-4249

ERIC SCHWARTZ
TOSCO CORPORATION
2401 Colorado Avenue
Santa Monica, California
90406-2401
(213) 207-7083

JOHN P. MATHIS
CATHERINE C. WAKELYN
BAKER & BOTTS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 457-5500
Counsel for
Pennzoil Company and
Tenneco Oil Company

KENNETH L. BACHMAN, JR.
EUGENE M. GOOTT
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
Counsel for Tosco Corporation

MOTION FILED
DEC 27 1985

No. 85-429
No. 85-430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

STARK RITCHIE
(Counsel of Record)
Catherine M. Eshelman
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Counsel for Amicus Curiae

CASELLAS PRESS INC - 1717 K STREET NW WASHINGTON DC - 223-1220

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether existing law imposes any restraints or guidelines on a court's power to effect restitution beyond requiring the defendant to forfeit his unjust enrichment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

ARGUMENT 3

I. THE TECA MAJORITY ENTERED A REMEDY CONTRARY TO THE CONTROLLING LAW OF RESTITUTION AND WITHOUT DUE PROCESS 4

A. CONTROLLING DECISIONS DEMONSTRATE THAT TECA IN EFFECTING RESTITUTION SHOULD HAVE ATTEMPTED TO RESTORE THE STATUS QUO AND TO GIVE EFFECT TO THE STATUTORY PURPOSES 5

1. TECA Disregarded Its Duty To Restore the Status Quo 7

2. TECA Failed To Give Effect To The Statutory Purposes 8

B. THE TECA MAJORITY OPINION DEPRIVES INJURED PARTIES OF DUE PROCESS WITHOUT ANY FORM OF NOTICE AND HEARING 10

II. SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED BECAUSE ISSUES OF MATERIAL FACT WERE IN DISPUTE 11

A. MATERIAL FACTS WERE IN DISPUTE 11

B. THIS COURT HAS FOUND THAT COMPLEX ISSUES SHOULD NOT BE DECIDED ON AN INADEQUATE RECORD 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: Page

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 12, 13

Central States Electric Co. v. City of Muscatine,
324 U.S. 138 (1945) 10, 11

Citronelle-Mobile, Gathering Inc. v. Edwards,
669 F.2d 717 (TECA 1982) 7

Federal Power Comm'n v. Interstate Natural Gas Co.,
336 U.S. 577 (1949) 6, 11

Fuentes v. Shevin,
407 U.S. 67 (1972) 10

Kennedy v. Silas Mason Co.,
334 U.S. 249 (1948) 13

Logan v. Zimmerman Brush Company,
455 U.S. 422 (1982) 10

Mitchell v. De Mario Jewelry, Inc.,
361 U.S. 288 (1960) 5

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 10

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 5, 6, 8, 10

United States v. Exxon Corp.,
561 F. Supp. 816 (D.D.C. 1983), 4 ENERGY MGMT.
(CCH) ¶26,539 (TECA 1985) ..... *passim*

Page

Statutes:

Economic Stabilization Act of 1970, 12 U.S.C.A. §1904 note (1980) 4, 8

Emergency Petroleum Allocation Act, 15 U.S.C.A. §751 *et seq.* (1982) 8

Warner Amendment, Pub.L.No. 97-377, 96 Stat. 1830, 1919 (1982) 2, 3, 9

Regulations:

10 C.F.R. §212.73 (1975) 3

10 C.F.R. §212.74 (1975) 3

Miscellaneous:

6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶56.15[3] (2d ed. 1985) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-429
No. 85-430

EXXON CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API) submits this brief *amicus curiae* in support of the petitions for writ of certiorari filed by Exxon Corporation, No. 85-429, and Marathon, *et al.*, No. 85-430.

INTEREST OF THE AMICUS CURIAE

API is a trade association representing approximately 215 member companies and 8,000 individual members. API's members are engaged in all facets of the petroleum industry including the production, refining, and market-

ing of crude oil and refined petroleum products. Throughout the time periods involved in this case, API members were subject to the price and allocation laws and regulations adopted by the Congress and the Department of Energy (and its predecessor agencies) governing the sale and distribution of crude oil and petroleum products.

API members have a direct interest in the remedy entered and affirmed by the lower courts disposing of almost $2 billion for alleged overcharges associated with the sale of crude oil produced from the Hawkins Field. By affirming the district court's award of all alleged overcharges to the states in accordane with Section 155 of the Furthering Continuing Appropriations Act of 1983, commonly known as the "Warner Amendment," Pub.L. No. 97-377, §155, 96 Stat. 1830, 1919 (1982), the Temporary Emergency Court of Appeals (TECA) categorically and arbitrarily denied members of the petroleum industry, including many API members, their due process rights to demonstrate they were entitled to receive a portion of the refund.

The decision below is troubling in several other respects to industry at large, particularly insofar as it enforces a regulatory interpretation that was expressly repudiated by DOE, subjects a firm to retroactive application of a rule that was not intended to be retroactive, enforces unjust and discriminatory classifications among crude oil producers, and permits DOE to ignore its own rules, as set forth in the petitions.

API files this *amicus curiae* brief, however, for the limited purpose of asking the Court in particular to rectify the unfair and unprecedented denial of the legal rights of its members with respect to the issue of remedy – a matter which unquestionably affects their economic interests.

ARGUMENT

On July 1, 1985, a majority of the Temporary Emergency Court of Appeals (TECA) affirmed a District of Columbia U.S. District Court holding that Exxon Corporation had violated the Department of Energy's two-tier crude oil price regulations, 10 C.F.R. §§212.73, 212.74 (1975). *United States v. Exxon Corp.*, 4 ENERGY MGMT. (CCH) ¶26,539 (TECA July 1, 1985). TECA also affirmed the District Court finding that Exxon was liable in restitution for $1.6 billion in overcharges and interest and that court's award of the refund to the states for distribution by them.

The lower courts entered a remedy in flagrant disregard of controlling legal precedent. The TECA majority opinion assumed that a court's restitutionary duty begins and ends when it requires a defendant to forfeit his "unjust enrichment." This assumption ignored the decisions of this Court addressing the restitutionary powers and duties of the judiciary, and instituted a remedy that suggests the courts possess unbridled restitutionary powers.

The comprehensive dissenting opinion filed by Judge Becker of TECA provides a textbook analysis of the applicable law on the restitutionary authority of the courts, the notice and hearing required by due process before distribution of a court-created fund, intervention and interpleader and the inappropriateness of reliance on the Warner Amendment in the instant case. When this thorough dissent is contrasted with the TECA majority opinion and the stark lack of legal analysis therein, it seems quite apparent that error was committed below.

This Court has articulated some specific principles to guide courts in restitution cases similar to the case at bar. The Court below made no attempt to comply with those

decisions. Instead, it assumed it was under no duty to undertake any type of systematic inquiry with respect to the determination of the identity of those suffering losses as a result of the alleged wrongful acts and affirmed a restitutionary remedy on summary judgment despite the existence of contraverted issues of material fact.

This Court should review the lower court's cavalier disregard of judicial responsibility in effecting restitution. We believe this Court should remand this case with an opinion that will ensure that the huge sums at issue here, and funds which may be distributed in future cases, are handled in a systematic and equitable fashion that will more nearly accomplish a return to the status quo – which is one of the basic objectives of the restitution doctrine.

I. THE TECA MAJORITY ENTERED A REMEDY CONTRARY TO THE CONTROLLING LAW OF RESTITUTION AND WITHOUT PROVIDING TO POTENTIAL CLAIMANTS NOTICE AND AN OPPORTUNITY TO BE HEARD

The judicial power to order restitution arising from alleged price control violations is found at Section 209 of the Economic Stabilization Act, which authorizes the Courts to ". . . order restitution of moneys received in violation of any such order or regulation." 12 U.S.C.A. §1904 note (1980).

The dissenting opinion filed by Judge Becker demonstrates, by surveying the controlling law on the judicial duty and power to order restitution, that the federal courts have comprehensive equitable power to order restitution, but that power is not totally unlimited. 4 ENERGY MGMT. (CCH) ¶26,539 at 26,433. The cases cited by Judge Becker also describe the *nature* of that equitable restitutionary

power. *Id.* at 26,433-439. Having described the nature of the courts' restitutionary powers, Judge Becker then concludes that potential claimants to the fund created by the court have a protected property right to restitution of damages, and further, that the Due Process clauses of the Fifth and Fourteenth Amendments require some form of hearing before depriving those parties of their property interest. *Id.* at 26,444-447. API submits that when Judge Becker's analysis of the controlling precedents is contrasted with the conclusions reached by the majority opinion, it is apparent that the majority completely disregarded the applicable law articulated by this Court.

A. CONTROLLING DECISIONS DEMONSTRATE THAT TECA IN EFFECTING RESTITUTION SHOULD HAVE ATTEMPTED TO RESTORE THE STATUS QUO AND TO GIVE EFFECT TO THE STATUTORY PURPOSES

Although the cases cited by Judge Becker stand for the proposition that the courts possess broad equitable powers to effect restitution, those cases clearly articulate guidelines for the courts to follow in restitution cases. Most notably, this Court has stated that a court in equity may give "*complete relief in light of the statutory purposes.*" *Mitchell v. De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (emphasis added). This Court has set forth two important principles which are to govern judicial restitution in price control regulatory programs. First, the remedy must "protect the public interest while giving necessary respect to the private interest involved." *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Second, the restitution order should "enforce compliance with the Act" and "give effect to its purposes." *Id.* at 400. These principles are satisfied when the courts act "by restoring the status quo

and ordering the return of that which rightfully belongs to the purchaser or tenant." *Id.* at 402. The notion that a court in effecting restitution should attempt to restore the status quo was echoed in *Federal Power Comm'n v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949), wherein Justice Douglas indicated that the Court's duty in administrating a fund of rate overcharges was to "undo the wrong" by identifying those who had suffered a loss. Justice Douglas stated:

> In conclusion, the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But the federal court must make its prognostication, whether an excursion into federal or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterized the administrative process.

Id. at 584.

In sum, the law of restitution as enunciated by this Court suggests that two principles should guide the courts in effecting restitutionary remedies in analogous cases. First, it is the responsibility of the court to attempt to restore the status quo, *Interstate Natural Gas,* 336 U.S. 577, and second, the court should attempt to effect the purposes of the underlying statute, *United States v. Morgan,* 307 U.S. 183 (1939). The TECA majority disregarded both principles.

1. TECA Disregarded Its Duty to Restore the Status Quo

In stark contrast to the principles enunciated by this Court, the TECA majority concluded it was under no duty to reestablish, or even attempt to reestablish, the status quo. TECA premised that conclusion on the assumption that such a task would be "impossible," without the benefit of any evidence to prove or disprove that ascertaining and compensating injury would in fact be "impossible." The court said:

> "[T]here was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products."

United States v. Exxon Corp., 4 ENERGY MGMT. (CCH) ¶26,539 at 26,427. The TECA majority determined its only duty in effecting restitution to be:

> "to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, much less the amount of any damage.*" (emphasis in original).

Id. at 26,425 *citing Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722 (TECA 1982), *cert. denied*, 459 U.S. 877 (1982). TECA thus determined that its only duty in effecting restitution was to ascertain the amount of the defendant's "unjust enrichment" and force him to disgorge that amount, without regard to the identity or extent of injuries sustained as a result of the alleged wrong.

2. TECA Failed to Give Effect to The Statutory Purposes

TECA also entered a remedy that fails to comport with this Court's requirement that a fund should be distributed in accordance with the purposes of the underlying statutes. *Porter,* 328 U.S. at 400. The Economic Stabilization Act, 12 U.S.C.A. §1904 note (1980), sought to stabilize prices, especially those associated with crude oil and petroleum products, for all sectors of the economy, and to maintain and promote competition within the petroleum industry. The Emergency Petroleum Allocation Act as amended by the Energy Policy and Conservation Act, 15 U.S.C.A. §751 *et seq.* (1982), recognized the need to fairly distribute crude oil and refined products throughout the petroleum industry and to allow members of the industry to recoup appropriate costs. In short, these Acts, together with the federal regulatory programs implementing their provisions, were designed to benefit the entire American economy, public and private. Nothing in these Acts suggested that individual consumers as a class were *per se* to be protected over other groups. Instead, the programs were intended to work by calling for "generally comparable sacrifices by business and labor as well as other segments of the economy." ESA Section 203(b)(5), 12 U.S.C.A. §1904 note (1982).

API maintains that the method for allocating these "sacrifices" among all segments of the economy was decided by DOE and reflected in the framework of the DOE regulations. Therefore, in order to carry out the statutory purpose the lower courts were required to make a realistic attempt to use these regulations. Instead, the TECA majority arbitrarily dismissed their use as "futile" and distributed the funds to the states for the benefit of a special class of consumer. Though such persons were pro-

tected by the statutes and regulatory program, they were no less protected than any other aggrieved group, including members of the petroleum industry. API submits that to the extent a party absorbed a loss attributable to the alleged overcharges, he or she was within the scope of congressional concern and is a candidate to qualify for a portion of any restitutionary award. Such an award would be consistent with the public and the private interests identified in these statutes and the underlying regulatory program.

The remedy chosen by TECA, instead of resting upon established equitable principles, is premised upon the unsupported judgment that the petroleum industry passed through the alleged Hawkins Field overcharges to ultimate consumers. By thus eschewing the systematic guidelines of this Court and awarding the money at issue to the states on the basis of its assumptions about industry practice, TECA has endorsed extreme judicial activism. The judicially legislated remedy has established questionable precedent for future refund cases. The opinion suggests a policy whereby once a defendant has been divested of alleged "unjust enrichment," a court is free to award the fund to whomever it chooses, without conducting any inquiry into who suffered loss. The courts thus would have seemingly unbridled discretion to act in the public interest* when effecting restitution.

If the restitutionary principles enunciated by this Court are ignored, then no restraints check the restitutionary

---

*For a complete discussion of why the remedy selected by TECA was not in the public interest, see Judge Becker's discussion of the inappropriateness of relying on the Warner Amendment. 4 ENERGY MGMT. (CCH) ¶26,539 at 26,455.

powers of the courts. Review of this case will ensure that the substantial sums of money involved in this and other pending DOE price control cases are properly distributed as intended by Congress.

B. THE TECA MAJORITY OPINION DEPRIVES INJURED PARTIES OF DUE PROCESS WITHOUT ANY FORM OF NOTICE AND HEARING

As Judge Becker noted in his dissenting opinion, the right to restitution of damages caused by an alleged violation of law is a property right under the Due Process clauses. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). Accordingly, the Constitution requires at a minimum notice and an opportunity for comment appropriate to the case. *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950).

The remedy entered by the district court denied all potential claimants to the restitutionary fund an opportunity to come before the court to be heard. Moreover, the briefing opportunity parties had before TECA cannot be said to have cured the denial of due process:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972). In *Porter v. Warner,* this Court indicated that the judiciary has "inherent power to bring all the interested parties and settle the controversies. . ." 328 U.S. at 403. This comports with the Court's action in *Central States Electric Co. v.*

City of Muscatine, where the fund was ordered to be held a "reasonable time to permit interested pesons to litigate the issue in a tribunal having jurisdiction. . .", 324 U.S. 138, 146 (1945). Distribution of a fund should not involve prolonged litigation, *Interstate Natural Gas,* 336 U.S. at 584, but neither should it ignore procedural due process guaranteed under the Fifth Amendment. Time limitations, special masters, and other administrative devices were available to the district court to expedite the case and still afford parties their constitutional rights.

II. SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED BECAUSE ISSUES OF MATERIAL FACT WERE IN DISPUTE

A. MATERIAL FACTS WERE IN DISPUTE

The District Court concluded categorically that only consumers of petroleum products bore the alleged Hawkins Field overcharges. *United States v. Exxon Corp.,* 561 F. Supp. 816, 853 (D.D.C. 1983). Without the benefit of any briefing or evidence, the Court held that the incidence of the presumed injury could not be ascertained and compensated. The TECA majority opinion takes a slightly different approach. Using the same incomplete factual record before the district court, the TECA majority describes in detail how difficult it would be to determine who had borne the alleged overcharges. "Futility," however, is not a legal question, it is one of fact. Although the TECA majority opinion admits the possibility that many different parties could have absorbed the alleged overcharges, including resellers, retailers, and consumers, it merely concludes it is under no duty to determine who sustained injury and affirmed the granting of summary judgment.

Summary judgment as a matter of law should be granted only when no genuine issue as to any material fact remains for trial. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); FED.R.CIV.P. 56. The moving party carries the burden of showing the absence of genuine issue as to any material fact and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the opposing party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

API submits that at least three material facts are clearly in dispute: (1) who absorbed the impact of the alleged Hawkins Field overcharges; (2) in what amounts; and (3) whether it is impossible to find a way to compensate.

The TECA majority and the District Court's assertions of the "impossibility" of answering these questions is belied by a number of sources. API asks this Court to take judicial notice of information contained in letters written on September 3 and 23, 1985 by Representative John D. Dingell, Chairman of the House Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. The letters show that DOE's Office of Hearings and Appeals concluded not only that identification of persons injured by crude oil overcharges was possible, but that it was possible to implement an "administratively workable" restitutionary mechanism. Appendix I, II. These conclusions are in direct conflict with the position urged upon the court by DOE, namely that identifying and compensating injured parties was a "futile" task. In addition, in the petition of Marathon, *et al.*, No. 85-430, for writ of certiorari before this Court, there is factual evidence which parties are prepared to present which demonstrates who absorbed the alleged overcharges in the sale of both controlled and decontrolled petroleum

products. Thus, TECA accepted on summary judgment the government's contention that it is "impossible" to ascertain who is injured by crude oil overcharges, despite evidence that OHA concluded it is practicable to do so. TECA's refusal to even attempt to explore factual material which is relevant in identifying and compensating parties suffering loss is reversible error.

B. THIS COURT HAS FOUND THAT COMPLEX ISSUES SHOULD NOT BE DECIDED ON AN INADEQUATE RECORD

There can be no doubt that summary judgment must be denied when there are material issues of fact in dispute and that the moving party has the burden of showing a lack of a dispute. 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.15[3] (2d ed. 1985). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). This Court though, has also recognized the need for a fully developed record in cases involving complex issues of public importance. Such is the duty of a court in order to effect sound judicial administration. In a case which present analogies to the instant case, this Court in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), vacated a lower Court's grant of summary judgment for this reason. Justice Jackson stated that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import. . ." *Id.* at 256-57. Moreover, in words applicable to this case, he indicated that even if the record before the court could support issuing a summary judgment, good judicial administration demanded that the motion be denied in certain instances:

> We consider it the part of good judical administration to withhold decision of the ultimate questions involved in this case until this or

> another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Id.

In short, even in instances where there is some question regarding the materiality of contraverted facts, where the total complexity of the issues raised, both legal and factual, would benefit from the taking of additional evidence or argument, it is an abuse of a court's discretion to render a summary judgment.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

STARK RITCHIE
(Counsel of Record)
Catherine M. Eshelman
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Counsel for Amicus Curiae

December 23, 1985

APPENDIX I

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

September 3, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Thank you for your August 20, 1985 reply to my letter of July 30 in which I expressed considerable disagreement, based on the record of investigations by this Subcommittee and the General Accounting Office (GAO), with the June 21, 1985 "Statement of Restitutionary Policy" issued by you in conjunction with the issuance by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) of its June 19 report concerning the *Stripper Well* litigation.

It is disturbing that you and the DOE counsel do not want to present to the court a complete story concerning DOE's restitutionary practices, together with the views of the Chairman of the House Committee with legislative and oversight jurisdiction over your Department and this program. Presenting one side only misleads the court and could cause the court to decide on the mistaken belief that

Congress and the DOE are in accord in this matter. I urge you to reconsider this matter before September 16.

As part of your reconsideration, I urge you to consider the following comments.

As you know, as long ago as March 14, 1985 I wrote to the Secretary of Energy (copy enclosed) about the OHA report and expressed concern about the status of the OHA report. In that letter, I said:

> If, despite this letter, anyone at DOE reviews or coordinates the OHA report, the Subcommittee expects to receive from OHA not only the final version, but also the OHA draft version, and from the DOE, the identity of all persons inside or outside DOE who reviewed the OHA draft report. No one should destroy the evidence this time.

After receiving an April 12 reply from Mr. Rayburn Hanzlik in which he indicated that an "internal review process' of the OHA report would take place at the DOE, I again wrote to the Secretary on April 9 (copy enclosed). I said:

> Subcommittee specifically reiterates its earlier request that each draft of the report (including any recommendations) that is made available to *anyone* outside of OHA be retained and provided to the Subcommittee after the report is issued.

I subsequently learned through our investigation of this matter that a draft report was prepared by OHA and given, as part of the "internal review process" dictated by DOE officials, to several such officials in early April. I also learned that DOE officials met in April and early May regarding this report. At those meetings, these officials made their views known to the OHA about the report.

Subsequently, the DOE received an order dated May 7, 1985 from the court confirming the claims in my March and April letters, that this was to be a report by OHA, not DOE. Accordingly, on June 13, 1985 Secretary Herrington wrote (copy enclosed) assuring me that DOE will comply with the court's order. He said:

> OHA will report the results on its fact-finding on the tracing of the overcharges without editing or modification by other parts of the Department. The Department will also provide its recommendations to the court, but the exact way in which this will be done has not yet been finally determined.

Unfortunately, as I show in this letter, the damage was done *before* issuance of the court's order. The OHA had been beaten into submission by the "internal" process described by Mr. Hanzlik. Its draft report was not liked by the DOE officials. This was understood by OHA and it was re-written to be a more bland report with a fact finding more to the DOE's liking.

When the report was issued in June, Mr. James U. DeFrancis of the DOE provided a copy to the Subcommittee by letter of June 24. On July 30, I wrote Mr. DeFrancis (copy enclosed) thanking him for the report and reminded the DOE of my earlier request for copies of the draft OHA report and the identity of the officials outside OHA who received that draft. On August 20 the OHA wrote to me "in response" to my letter to Mr. DeFrancis and provided a copy of the draft report.

The OHA said:

> Only one draft was circulated to persons outside of the Office of Hearings and Appeals. On April 1, 1985 we provided five copies of this

draft to the Administrator and Deputy Administrator of the Economic Regulatory Administration. Subsequently, we supplied one copy of the draft to the Assistant Secretary for Congressional, Intergovernmental and Public Affairs. We understand that ERA subsequently provided copies to the Office of General Counsel and to the Deputy Secretary.

A copy of this draft is enclosed. The information contained in this document is of a sensitive nature, representing the predecisional processes of the agency, and is exempt from mandatory public disclosure pursuant to Exemption 5 of the Freedom of Information Act, 5 U.S.C. Sec. 552(b)(5). We request that the Subcommittee exercise special care in the storage and handling of this draft to ensure its confidentiality and to protect against disclosure.

Let me state first that I disagree with the DOE claim of exemption from public disclosure, as this report was always to be a reply to a court order. *No* agency "predecisional process' was intended by the court (as is clear by the court's May 7 order although the DOE and OHA *improperly* went thru such a process prior to the May 7 order. Indeed, there never should have been any such "internal review process". No DOE policy was involved. DOE was free to adopt whatever policy, position, or decision it wanted separate from the court-ordered report. The Freedom of Information Act was not intended to exempt from disclosure documents of this nature. The OHA misapplies the Act in this case.

In regard to the draft OHA report, it is substantially different in content, substance, and tone (from introduction to end) from the final OHA report. Indeed, the very first

paragraph of the "Introduction" of the draft report differs (after the second sentence) from the public report.

The public report states:

> On May 7, 1985, the District court issued an order which clarified the manner in which the fact-finding report from OHA was to be submitted. *In re: The Department of Energy Stripper Well Exemption Litigation*, MDL. No. 378 (D. Kan., May 7, 1985) (order denying motion to expedite issuance of OHA's report).
>
> In that decision, the court ordered the OHA to issue its findings of fact of the tracing and impact of the overcharges in one separate report without editing or modification by the DOE. *Id., slip op.* at 7. Recognizing that the DOE's position on the utility of further efforts by the OHA and a recommended plan of restitution was a matter of agency policy, the court directed that these concerns be addressed in a second report "which shall be issued separate from the report of the OHA's fact-findings." *Id.* This report sets forth the OHA's analysis and findings of fact regarding the absorption of the impact of these crude oil overcharges by the U.S. domestic refining industry.

The report states:

> This report sets forth findings of fact regarding the absorption of the impact of crude oil overcharges by the U.S. domestic refining industry. The ultimate conclusion is reached that members of the refining sector of the domestic petroleum industry absorbed a portion of the overcharges and should be compensated. It also includes recommendations for a restitutionary

> mechanism which can be implemented efficiently. The refund mechanism which is recommended to the court would apply to refiners, other Entitlements Program participants, and consumers of refined petroleum products, such as utilities and airlines, that purchased product directly from refiners. It does not cover resellers or purchasers of products from resellers.

Most importantly, the OHA Findings of Fact set forth in the public report differ from those in the non-public draft. Further, a whole chapter entitled "V. Standards for the Fact-Finding Process' is omitted in the final report. In addition, the public report ends with the Findings of Fact, i.e. chapter VI. The draft report does not. It includes another chapter entitled "VIII. Recommendation of Restitutionary Mechanism."

All of these changes were apparently made as a result of the negative attitude expressed by DOE officials, such as yourself, after April 1 to the draft OHA report as part of DOE's improper "internal review process". OHA, which, of course, is *not* truely independent of the Deputy Secretary, the General Counsel or other DOE officials, apparently carved under the pressure exhibited through this negative attitude of DOE officials and re-wrote the drft to de-tone it, eliminate two whole chapters, and *change the findings.* The very thing I feared and predicted in my correspondence in March and April occurred. In my view, that action (under your auspices and other DOE officials was in violation of both the spirit and words of both court orders.

The OHA was not allowed to be a free agent. Indeed, OHA personnel were, as expected, "good soldiers" and adhered to the DOE policy-line, i.e. bring this program to

an end, do nothing to require more resources that could extend the program, and most importantly, use these funds to reduce the Federal budget deficit in the name of restitution. OHA had no choice because OHA lacked support at DOE for a refund policy.

I again request that you provide before September 16 a copy of my letter of July 30 to the court, together with this letter, and a copy of the OHA draft report.

Such disclosure is necessary not because the final report failed to include OHA's draft Chapter VIII, although I believe it properly should have been included because (despite OHA's mistaken characterization of the chapter as "policy") it informs the court on how to implement an administrative refund process, but because the fact finding of OHA was changed even slightly and a whole chapter relating to that fact finding was deleted after the OHA released the report to you and other DOE officials. Once that change occurred, the report lost its character as an OHA report, even though the mechanics of change were undoubtedly done by OHA and not the DOE officials. The DOE officials' interference did not stop at chapter VIII. It extended to the body of the report and the Findings of Fact. The court needs to be aware of this. Even with this knowledge, the court may adopt your policy. But without it, the court will be misled by the public report.

In addition, I request that you provide:

(a) a list of *all* persons within DOE (other than OHA) and at other agencies who received a copy of the April 1 draft or any later draft,

(b) a list of the dates of all meetings concerning this report and the identity of the participants,

(c) an explanation why the assurances provided by

the Secretary to me were apparently ignored by DOE officials in regard to this draft, and

(d) a copy of all memoranda, notes, and other documents (including marginal notes on each copy of the draft) prepared by DOE officials outside OHA regarding this report.

In conclusion, it is not my intention at this time to release this draft report. I believe that the OHA and DOE has an obligation to do so. But I will consider that view, depending on your response to me, after September 16. I understand that the court has set September 22 as the next date for briefing on these matters. Clearly, the court should be informed of these matters by then.

Sincerely,

JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosures (4)

cc: Honorable Philip R. Sharp, Chairman
Subcommittee on Fossil and Synthetic Fuels

Honorable Edward J. Markey, Chairman
Subcommittee on Energy Conservation and Power

Honorable James T. Broyhill, Ranking Minority Member
Subcommittee on Oversight and Investigations

Honorable James A. McClure, Chairman
Senate Committee on Energy and Natural Resources

Honorable J. Bennett Johnston, Ranking Minority Member
Senate Committee on Energy and Natural Resources

Honorable William H. Gray, III, Chairman
Committee on the Budget

Honorable Sidney R. Yates, Chairman
Subcommittee on Interior and Related Agencies

Honorable John S. Herrington, Secretary
Department of Energy

Honorable Joseph R. Wright, Jr., Acting Director
Office of Management and Budget

Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

Honorable John Carlin, Chairman
National Governor's Association

Honorable Francis X. Bellotti
Attorney General of Massachusetts
President
National Association of Attorneys General
444 North Capital Street, N.W., Suite 403
Washington, D.C. 20001

Honorable Rayburn Hanzlik, Administrator
Economic Regulatory Administration
Honorabled George B. Breznay, Director
Office of Hearing and Appeals
Department of Energy

APPENDIX II

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

September 23, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Except to the extent your September 19, 1985 reply to my September 3 letter identifies the numerous persons (outside the Office of Hearings and Appeals (OHA)) who were given copies of the April 1, 1985 OHA draft *Stripper Well* report and lists some of the "numerous meetings" by you and others in the Department to "discuss the Report and the Statement of Restitutionary Policy", your letter is somewhat misleading. Let me explain why I believe that to be the case.

First, you agree that the final OHA report and the April 1 draft "differ" in tone, but you contend that the "substance of the factual findings is exactly the same." Your interpretation and mine of what is encompassed by the word "substance" may differ. However, I believe it relevant to point out that the "words" and "emphasis", not just "tone", were changed significantly. For example, the publicly released June 1985 report states (pp. 77-78):

Each of the methods presented for determining who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods – refiner-per-barrel profit analysis – is not relied upon in this Report, except as part of the "big picture." The other – an analysis of refiner cost banks – is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. Although marginal economic analysis rests upon assumptions and estimations, we find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers an appropriate question, namely, to what extend did product prices rise when the refining industry experienced small crude oil cost increase. It does not, however, answer the question with respect to any particular firm. As noted previously in this report, to determine the extent to which a particular refiner passed through the impact of the MDL 378 overcharges, a number of factors specific to the operations of that refiner must be analyzed. We know of no methodology that would accomplish analyses of those factors, and no party in this proceeding has suggested such a methodology. Marginal economic analysis analyzes industry-wide data and produces results which estimate the *average* amount of cost absorption by refiners as a class. The impact sustained by individual refiners will, of course, vary from the industry-wide average.

The comparable paragraph in the of non-public April 1 draft report is shorter. It states (p. 73):

> Each of the methods presented for our use to determine who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods — refiner per-barrel profit analysis — is not relied upon in this determination, except as part of the "big picture." The analysis of refiner cost banks is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. We find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers the appropriate question in this proceeding, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase. It also yields precise numbers with a high level of confidence.

Whether these and other changes in words and emphasis are "substantial" or not is a question for all to judge (particularly the Court), not just the Department of Energy (DOE). You are asking the Court, the parties, the public and this Subcommittee to accept your judgment on faith of what is substantial. But your judgment is colored by your desire to have your policy adopted. By keeping the contents of the draft locked up at DOE, you want to leave all in the dark as to alternatives. I believe the Court and the public, not you, should decide this matter.

I point out one word change in the above paragraphs

that, I believe, changes the emphasis significantly. The fifth sentence of the both paragraphs is virtually identical.The difference lies with a change of an article "an" to "the". Thus, the public report states the "marginal economic analysis answers *an* appropriate question", while the draft states it "answers *the* appropriate question". Is that "minor"? Is the "substance exactly the same"? The court could easily conclude "No it is not," particularly in light of other changes in the paragraph.

There are other significant changes in the findings. Most importantly, chapter V (deleted in the final version) indicates the standards used by the OHA in its fact-finding. Your letter does not discuss that deletion. I feel certain that the Court, the parties, and the public would welcome this information and consider it "substantial" to the fact-finding.

Second, you state:

> Whatever few changes made to the substance of the factual determinations as OHA proceeded from the April 1 Draft to the final Report were made entirely within OHA and without review, approval or other such involvement by persons outside OHA. I am assured by the Director of the OHA that the findings of fact were made in strict compliance with the Court's May 7 Order.

Clearly, there were far more than a "few changes" to the entire report, even though all such changes were, as you state, "technically" made "within OHA". While I am certain that the OHA Director honestly believes that the findings were "in strict compliance" with the Order, the fact remains that between April 1 and May 7, the DOE had ample opportunity, as your letter shows to "influence" the changes. The May 7 and 10 meetings were clearly fresh in

the OHA Director's mind when the changes were made. The die was cast by the time you and he learned of the May 78 Order. DOE did not like OHA's report or any recommendation for further proceedings. The treasury solution was the DOE policy. The report needed change to allow that policy. Indeed, *all* of the changes seem to coincide neatly with that view as expressed in your June policy statement. By indirection, the OHA Director re-worked the draft to make it bland and "in synch" with your "policy".

Third, your letter interprets the Court's May Order very conservatively by saying: "Given the Court's May 7 Order, such recommendations and policy decisions simply had no place in the fact-finding report." Earlier your Department bent over backwards to interpret the Court's first Order liberally as giving DOE wide leeway to review the report and make changes.

However, the May 7 Court Order did not change the earlier Order of the Court where, as noted by OHA in the draft report, the Court said it "will also welcome the views of the OHA on how restitution can best be achieved in this case." The Court encouraged OHA to make recommendations or views on restitution. OHA did so in the draft report which you are seeking to withhold from the Court and the public. The May 7 Order supplemented the 1983 Order. It did not change it. It made clear, however, that review and change by DOE was improper.

In the May 7 Order, the Court said:

> This Court referred this legislation to the OHA only to take advantage of the procedures and expertise which the OHA had developed in tracing the impact of overcharges on the oil industry.

> This litigation was referred to the OHA for its determination of which parties had suffered injury in what amounts. That determination is solely a question of fact. *The Court did not intend to allow the DOE to make the policy decisions on whether such an attempt at tracing is feasible or how to actually make restitution, although the Court is interested in the DOE's position on these matters.* (Underlining supplied)

Chapter VIII of the April 1 draft OHA report states:

> *The following sections present a restitutionary mechanism to implement the factual findings cotained in this determination which we believe is administratively workable.* The mechanism provides for the processing of refund applications filed by direct purchasers of MDL 378 crude oil, Entitlements Program participants, and consumers of refined petroleum products that purchased those products directly from refiners. These applications can be accepted promptly upon announcement of a payment proceeding. We recognize that his undertaking will require the dedication of significant resources. *If directed by this Court, the Office of Hearings and Appeals is ready to assist in this endeavor.* (Underlining Supplied)

While the Court may disagree, I believe that the OHA recommendation is, in effect, an OHA view on "how to actually make restitution", based on its fact-finding. So long as you refuse to allow OHA to release its draft, the Court will never have the opportunity to agree or disagree. Again I urge that, as a minimum, you release the April 1 draft to the Court. Let the Court decide its value.

Since receiving your September 19 letter, I received the enclosed September 12 Order by Judge Frank G. Theis. Strangely, you mention that the "question of whether the April 1 Draft should be made available to the parties is now before the Court on a discovery motion," but you did not mention the September 12 Order. Please provide a copy of your reply to that Order.

In view of the fact that the Court is now aware of the April 1 draft and has issued the September 12 Order, I will not, at this time, release the draft report. I am not, however, convinced by your arguments for non-disclosure and will probably release the draft report if you do not furnish it to the Court pursuant to the September 12 Order. I believe your reasons for wanting to retain "confidentiality" have nothing to do with protecting even a modicum of the "deliberative process", but are aimed at preserving your Federal deficit cutting, non-restitutionary policy of last June. The so-called "deliberative process' would *not* "be seriously impaired" by disclosure of the draft to the Court. In fact, the extent to which the April 1 draft was widely circulated within the DOE, (in violation of the Court's Order of 1983) makes a mockery of that process, particularly insofar as you equate the OHA process with that of a "Special Master." I have never known a Special Master to have his drafts reviewed extensively by persons not under with the Special Master.

In your reply on page 3 of your letter, you state there were "numerous meetings" to discuss the report and the "Statement of Restitutionary Policy". When was that policy prepared and first circulated? Who received it? Was a draft of it provided in any form to the OHA Director at the May 7 or 10 meetings? When was the Director first

made aware of the policy? What were the nature of the May 7 and 10 discussions which you attended?

Finally, I note your continued refusal to file my letter with the Court. You state:

> Courts have repeatedly held that the views of individual members of Congress, even if they are committee chairmen, are to be given no weight in construing or applying Federal law, except as they may be part of pre-enactment commentary on legislation being enacted, so that the Courts can discern the views of the Congress as a body at the relevant time of its adoption of legislation.,

If this is so, then I wonder why you have declined to make my views known to the Court. If, as you state, the Court will give my views on DOE policy "no weight," so be it. There can be no harm to DOE in providing them so they will be before the Court. The Court, of course, is free to reject, ignore, or consider them.,

You note that one of the parties attached a copy of my September 3 letter with their motion. That is interesting. However, I prefer that the Government, not a private party, as a courtesy provide my views to the Court. I do not think it unreasonable to ask that you extend this courtesy to me or any other Member of Congress.

I again urge that you release the April 1 draft to the Court and that you provide my letters to the Court, including this letter.

I request your reply by October 7, 1985.

Sincerely,

/s/ John D. Dingell
JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosure (1)

cc: Honorable James T. Broyhill
Ranking Minority Member

Honorable John S. Herrington, Secretary
Department of Energy

Mr. Marshall Staunton, Acting Administrator
Economic Regulatory Administration
Department of Energy

Honorable George B. Breznay, Director
Office of Hearings and Appeals
Department of Energy

Honorable Charles A. Bowsher, Comptroller
General Accounting Office

MOTION FILED

DEC 27 1985

No. 85-429
No. 85-430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

STARK RITCHIE
(Counsel of Record)

Catherine M. Eshelman

AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

CASILLAS PRESS INC - 1717 K STREET NW WASHINGTON DC - 223-1220

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-429
No. 85-430

EXXON CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The American Petroleum Institute (API) respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.* The consent of the attorneys for both petitioners and respondent herein have been obtained. In addition, the consent of the attorneys for 11 other parties herein has been obtained, but the attorneys for 12 parties herein refused to consent to the filing of a brief by API as *amicus curiae.* The remaining parties have not responded to API's request for consent. Copies of all letters have been logged with the Clerk.

The applicant, American Petroleum Institute (API), has an interest in the case in that API is a trade association

representing approximately 215 member companies and 8,000 individual members. API's members are engaged in all facets of the petroleum industry including the production, refining, and marketing of crude oil and refined petroleum products. Throughout the time periods involved in this case, API members were subject to the price and allocation laws and regulations adopted by the Congress and the Department of Energy (and its predecessor agencies) governing the sale and distribution of crude oil and petroleum products.

API members have a vital and legitimate interest in the remedy entered and affirmed by the lower courts disposing of almost $2 billion for alleged overcharges associated with the sale of crude oil produced from the Hawkins Field. By affirming the district court's award of all alleged overcharges to the states in accordance with Section 155 of the Furthering Continuing Appropriations Act of 1983, commonly known as the "Warner Amendment", Pub.L. No. 97-377, 96 Stat. 1830, 1919 (1982), the Temporary Emergency Court of Appeals (TECA) categorically and arbitrarily denied every member of the petroleum industry, including many API members, their due process rights to demonstrate they were entitled to receive a portion of the alleged overcharges. API files this *amicus curiae* brief asking the Court to rectify this unfair and unprecedented denial of the legal rights of its members which unquestionably affects their economic interests.

Although the briefs of the petitioners herein in the Temporary Emergency Court of Appeals argue that the remedy chosen was in conflict with law, API believes that the decisions of the courts below raise broader questions about the general restitutionary powers of the federal

courts. If applicant's argument is approved by this Court, the decisions of the courts below must be reversed.

Respectfully submitted,

STARK RITCHIE
(Counsel of Record)
Catherine M. Eshelman
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

December 26, 1985